Nos. 24299 - 24300

JOHN T. FEY, Clerk

United States Court of Appeals

For the Second Circuit

October Term, 1956

Nos. 24299 - 24300

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

MORTON SOBELL,
Defendant-Appellant.

On Appeal from an Order of the United States District Court for the Southern District of New York

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COMBINED APPENDIX TO APPELLANT'S BRIEFS IN NOS. 24299 AND 24300

DONNER, KINOY & PERLIN,
342 Madison Avenue,
New York, New York,
By FRANK J. DONNER
ARTHUR KINOY
MARSHALL PERLIN

BENJAMIN DREYFUS,
57 Post Street,
San Francisco, California,

Attorneys for Defendant-Appellant.

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United States Court of Appeals

For the Second Circuit

October Term, 1956

Nos. 24299-24300

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MORTON SOBELL,

Defendant-Appellant.

Statement Under Rule 15(b)

This is an appeal from an opinion and order of the United States District Court for the Southern District of New York, denying appellant's motions for a hearing pursuant to Title 28, U. S. C., Section 2255. The court's opinion denying the motions, entered on June 20, 1956, is reported at 142 F. Supp. 515. Notices of appeal were filed on June 27, 1956.

On May 8, 1956, appellant, pursuant to Title 28, U. S. C., Section 2255, moved for a hearing and, upon the hearing, an order vacating and setting aside the sentence and judgment of conviction, entered April 5, 1951, on the grounds that his conviction was unjustly and illegally procured in violation of the Constitution and laws of the United States, in that the prosecuting authorities knowingly, wilfully and intentionally used false and perjured testimony and evidence, suppressed evidence which would have aided appellant and impeached the prosecution's case and exposed the falsity thereof, and made false representations to the court.

Statement Under Rule 15(b)

Appellee's answering affidavit was submitted on May 21, 1956. Appellant's reply affidavit was submitted on May 26, 1956. On May 21, the motion was referred over appellant's opposition to the Hon. Irving R. Kaufman, United States District Judge, who presided at the original trial.

On May 25, 1956, appellant filed a second motion for a hearing and other relief, pursuant to Title 28, U. S. C., Section 2255, on the grounds that the sentence was imposed in violation of the Constitution and laws of the United States and that the court was without jurisdiction to render the judgment of conviction and to impose the sentence, in that the United States and the trial court lacked all power over the proceedings and hence could not try appellant as a result of violations of the Treaty of Extradition between the Governments of the United States and Mexico, and the invasion of the sovereignty of Mexico.

Appellee's answering affidavit was submitted on June 4, 1956, and appellant's reply affidavit on June 6, 1956.

Oral argument on both motions was had on June 4, 1956.

Appellant is presently detained in the United States Penitentiary at Alcatraz, California, and has been in federal custody since August, 1950.

Notice of Appeal from Denial of First Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. C 134-245

UNITED STATES OF AMERICA

v.

MORTON SOBELL

Name and address of appellant:

Morton Sobell, Alcatraz Penitentiary, Alcatraz, California.

Name and address of appellant's attorneys:

Donner, Kinoy & Perlin, 342 Madison Avenue, New York, New York.

Benjamin Dreyfus, 57 Post Street, San Francisco, California.

Offense:

Violation of Title 50, United States Code, Section 34(a)

Statement of judgment or order:

The order and opinion of the Honorable Irving R. Kaufman, United States District Judge, entered June 20, 1956, denying appellant's motion filed May 8, 1956, for an order granting a hearing to determine the issues and make findings of fact and conclusions of law with respect thereto and

upon such findings of fact and conclusions of law for an order vacating and setting aside the sentence and judgment of conviction and discharging the appellant forthwith from detention and imprisonment or, in the alternative, granting him a new trial, said motion being made pursuant to Title 28, United States Code, Section 2255, upon the grounds that the conviction was unlawfully, illegally and unjustly procured in that the prosecution knowingly, wilfully and intentionally used false and perjurious testimony, made false representations to the Court, and suppressed evidence which would have impeached and refuted testimony given against appellant.

Name of institution where now confined:

United States Penitentiary, Alcatraz, California.

I, the above named appellant, hereby appeal to the United States Court of Appeals for the Second Circuit from the above stated opinion and order and each and every part thereof.

Dated, New York, New York,
June 27, 1956.

MORTON SOBELL
by his attorneys
DONNER, KINOY & PERLIN
By MARSHALL PERLIN
and
BENJAMIN DREYFUS

Notice of Appeal from Denial of Second Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. C 134-245

UNITED STATES OF AMERICA

v.

MORTON SOBELL

Name and address of appellant:

Morton Sobell, Alcatraz Penitentiary,
Alcatraz, California.

Name and address of appellant's attorneys:

Donner, Kinoy & Perlin, 342 Madison Avenue,
New York, New York.

Benjamin Dreyfus, 57 Post Street, San Francisco,
California.

Offense:

Violation of Title 50, United States Code, Section 34.

Statement of judgment or order:

The order and opinion of the Honorable Irving R. Kaufman, United States District Judge, entered June 20, 1956, denying appellant's motion filed May 25, 1956, for an order granting a hearing to determine the issues and make findings of fact and conclusions of law with respect thereto and

upon such findings of fact and conclusions of law for an order vacating and setting aside the sentence and judgment of conviction and discharging the appellant forthwith from detention and imprisonment, said motion being made pursuant to Title 28, United States Code, Section 2255, upon the grounds that the conviction was unlawfully, illegally and unjustly instituted and procured in violation of the Constitution and laws of the United States including *inter alia* the extradition treaty between the United States and Mexico, the Court thereby being without power to conduct the proceedings therein and impose sentence, the said Court being without jurisdiction over the subject matter.

Name of institution where now confined:

United States Penitentiary, Alcatraz, California.

I, the above named appellant, hereby appeal to the United States Court of Appeals for the Second Circuit from the above stated opinion and order and each and every part thereof.

Dated, New York, New York,
June 27, 1956.

MORTON SOBELL
by his attorneys
DONNER, KINOY & PERLIN
By MARSHALL PERLIN
and
BENJAMIN DREYFUS

Notice of Motion of May 8, 1956

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Sirs:

PLEASE TAKE NOTICE that upon the petition of Morton Sobell, and the appendices and exhibits attached thereto, and on the files and records of this case, the undersigned will move this Court at a Criminal Part to be held thereof, on May 21, 1956, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for

(1) an order granting a hearing to determine the issues and make findings of fact and conclusions of law with respect thereto, and upon such findings of fact and conclusions of law, for an order vacating and setting aside the sentence and judgment of conviction and discharging the petitioner forthwith from detention and imprisonment or, in the alternative, granting him a new trial:

(2) an order that petitioner be present at the hearing aforesaid; and

for such other and further relief as to the Court may be just and proper in the premises.

Dated: New York, N. Y., May 8, 1956.

Yours, etc.,

DONNER, KINOY & PERLIN,
By MARSHALL PERLIN,
342 Madison Avenue,
New York 17, N. Y.;

BENJAMIN DREYFUS,
57 Post Street,
San Francisco 4, California,
Attorneys for Defendant.

Petition Read in Support of Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

To the Honorable Judges of Said Court:

The petition of Morton Sobell respectfully represents:

First: The petitioner is unlawfully, unjustly and illegally detained and imprisoned by Paul J. Madigan, Warden of Alcatraz Penitentiary, a federal penal institution, acting as the agent and under the direction of the Attorney General of the United States and his authorized representatives, to whose custody he was commended, under and by virtue of a judgment entered and commitment issued by the United States District Court for the Southern District of New York dated and filed April 5, 1951.

Second: The indictment against petitioner, returned on January 31, 1951, charged in a single count that he had conspired with others to transmit to the Union of Soviet Socialist Republics "documents, writings, sketches, notes and information relating to the national defense of the United States" in violation of Section 34 of Title 50 of the United States Code.

Third: Petitioner was tried, together with co-defendants Julius and Ethel Rosenberg before judge and jury from March 6 to 29, 1951, when the jury returned a verdict of guilty against the petitioner.

Fourth: On April 5, 1951, petitioner was sentenced and committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of thirty years.

Fifth: On November 26, 1952, after petitioner had been incarcerated in the Federal House of Detention and Atlanta Penitentiary, the Attorney General, through his authorized representative, caused and ordered the transfer of petitioner to Alcatraz Penitentiary, where the petitioner has remained and is now detained.

Sixth: Petitioner duly appealed to the United States Court of Appeals for the Second Circuit from the aforesaid judgment of conviction. On February 25, 1952, that Court affirmed the judgment of conviction, Judge Frank dissenting. The court's opinion is reported at 195 F. 2d 583. On April 8, 1952, the Court denied a petition for rehearing, 195 F. 2d 609-611.

Seventh: Petitioner duly petitioned the Supreme Court of the United States for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit. On October 13, 1952, the United States Supreme Court entered an order denying said petition. 344 U. S. 838. On November 17, 1952, the United States Supreme Court entered an order denying petitioner's petition for rehearing. 344 U. S. 889.

GROUNDS FOR RELIEF

Eighth: Petitioner makes this application praying that his sentence be vacated and set aside and that he be discharged from detention and imprisonment pursuant to the provisions of Section 2255 of Title 28 of the United States Code on the ground that his conviction was unjustly, un-

lawfully and illegally procured in violation of the Constitution and laws of the United States, and that the sentencing court was without jurisdiction to impose the sentence, the said judgment being subject to collateral attack.*

Ninth: Petitioner makes this application on the grounds that the prosecuting authorities knowingly, willfully and intentionally used false and perjurious testimony and evidence, made false representations to the Court, and suppressed evidence which would have impeached and refuted testimony given against petitioner, all to cause and sustain this conviction, thereby rendering the judgment and sentence null and void and making it subject to collateral attack.

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* TITLE 28, UNITED STATES CODE, SECTION 2255:

Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court of the United States claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

Tenth: The prosecution in the course of the trial introduced evidence to prove that petitioner was deported by the Government of Mexico. The testimony in support of this contention was perjurious; the documentary evidence tendered in support thereof was false. This false evidence was essential to the prosecution's entire case against petitioner. The prosecution, knowing this evidence to be false and perjurious, willfully and intentionally used it to the prejudice of petitioner, thereby denying him his constitutional right to a fair trial.

Eleventh: No previous application for relief on the grounds set forth herein has been made.*

THE FALSE EVIDENCE

Twelfth: The prosecution, through the direct testimony of Government witness James S. Huggins and through Government Exhibit 25A (Exhibit 2), presented evidence that petitioner had been deported from Mexico by the Mexican Government. This evidence was known by the prosecution to be false.

Thirteenth: During the direct examination of Government witness Manuel Giner de los Rios by Assistant Prosecutor Roy Cohn, the following question was asked (R. 926):

> "Q. Do you know approximately what date Sobell was deported to the United States by the authorities?"

Counsel for petitioner objected, and the following colloquy ensued (R. 926):

> "Mr. Cohn: Of course, your Honor, I am asking a question. I think we have other proof coming.

* Petitioner has made prior application to the Court for relief pursuant to Title 28, U. S. C., Section 2255, but not on the grounds or facts set forth herein.

The Court: You have other proof coming of deportation?

Mr. Cohn: Yes, your Honor."

Fourteenth: Subsequently, the prosecution sought to introduce Government Exhibit 25, purportedly a copy of a manifest made in the regular course of business by the Laredo, Texas, office of the Immigration and Naturalization Service of the Department of Justice of the United States (R. 938).

The sole purpose of the prosecution in offering this document was to establish that petitioner had been validly deported pursuant to authorized action by the Government of Mexico.** The rest of the entries had no significance. Mr. Cohn, in tendering the exhibit, stated (R. 938):

> "Your Honor, the Government now offers in evidence a record from the Immigration and Naturalization Service of the Department of Justice of the United States, duly and properly authenticated concerning the circumstances of the departure of Sobell from Mexico to the United States."

Upon petitioner's insistence and over the prosecution's vigorous opposition, the Court ruled that Huggins be produced (R. 941-942).

Fifteenth: The following day, March 21, 1951, the prosecution tendered James S. Huggins, immigration inspector of the Immigration and Naturalization Service of the Department of Justice, stationed in Laredo, Texas. He produced Government Exhibit 25A and identified it as

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* In fact, Government Exhibit 25 was not an exact duplicate of the manifest. Compare Government Exhibits 25 and 25A (a photostatic copy substituted for the original). Exhibits 1 and 2 attached hereto.

** See brief of prosecution to Court of Appeals, pp. 65-67.

the manifest of petitioner, a contemporaneous document made and kept by him in the regular course of his duties as an Immigration and Naturalization Service inspector (R. 1024). The exhibit purported to carry the signature of petitioner (R. 1025), with the notation "Deported from Mexico." The notation was not on the manifest at the time petitioner signed it.

The witness, on voir dire, testified that the information on the front portion of the record was furnished by petitioner, save for the notation "Deported from Mexico." This notation, according to the witness, was based on information and observation (R. 1027-1028).

THE PROSECUTOR'S SUMMATION TO THE JURY

Sixteenth: The prosecution knowingly, willfully and intentionally utilized the false evidence of deportation by Mexico to establish that petitioner was caught in flight and returned to the United States by the Government of Mexico against his will. On the basis of this "deportation" the prosecution stated to the jury that petitioner's trip to Mexico, from its very inception, constituted flight from the Federal authorities. This evidence was related to Greenglass' purported flight plans to establish joint membership in the charged conspiracy.* Mr. Saypol stated:

> "When Rosenberg gave Greenglass the money, he told him to flee to safety by going from this country to Mexico, from where he would eventually embark for Europe, from the Mexican seaport of Vera Cruz" (R. 1525).

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* David Greenglass, a witness for the prosecution, testified that he was a member of the conspiracy and that there was a preconceived plan to flee the United States through Mexico to Europe to avoid prosecution by the authorities.

Petition. Read in Support of Motion

"The testimony is that in the same month that Greenglass was paid by the Russians through Rosenberg to flee the country to Mexico, and in the same month that the Rosenberg family got its passport photograph, in that very month Sobell and his family did in fact flee to Mexico where Sobell went to the airport of Vera Cruz, just as Greenglass had been instructed to do, and to the second airport at Tampico, and he went there under not one but under a string of aliases, using people in New York and in New Mexico [sic] as mail drops, exhibiting the conduct that fits in the pattern of only one thing—membership in this conspiracy to commit espionage for the Soviet Union and flight from an American jury when the day of reckoning had come" (R. 1529).

In his final remarks to the jury, Mr. Saypol again stressed that petitioner was returned against his will to the jurisdiction of the United States, saying (R. 1534):

"The FBI caught up with him and brought him back, and you have him here."

THE FALSE REPRESENTATIONS TO THE COURT

Seventeenth: On March 29, 1951, the jury returned a verdict of guilty against petitioner. On the day of sentencing, petitioner submitted an affidavit in support of a motion in arrest of judgment, challenging the personal jurisdiction of the Court. In the course of the argument on the motion, Mr. Saypol declared the motion should be denied because petitioner's affidavit contained falsehoods and therefore should be totally disregarded. Mr. Saypol, alluding to petitioner's claim that he had lawfully entered Mexico and had been improperly returned to the United States, stated (R. 1598-1599):

"This very affidavit contains a falsehood in the statement that there was exhibited amongst other things to the Mexican authorities visas. Counsel ought to know that his client never went into Mexico with a visa. It is evident in the failure to disclose that when this defendant arrived in Laredo, and was taken into custody by American agents, that arrest was effected pursuant to a lawful warrant.* It is evident in the fact that throughout this trial there sat in this courtroom the wife of the defendant, as to whom the affidavit states that she was present and we know that she was present from the time of the arrest until the time *the final act of deportation was effected at Laredo,* and yet not a word of testimony was heard from Mrs. Sobell.

The Court: I think I have enough.

Mr. Saypol: The whole affidavit portrays certainly that this defendant was not honorably escorted from Mexico, but that *literally he was kicked out as a deportee.*" (Emphasis supplied.)

The representations that petitioner had entered Mexico without a visa (tourist card) and was subsequently deported by the Government of Mexico were both false, as the prosecutor then and there well knew.

THE SIGNIFICANCE OF THE FALSE EVIDENCE

Eighteenth: The false evidence of petitioner's deportation from Mexico was essential to the prosecution's case. Its materiality and relevancy were recognized by both the trial and appellate courts.

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* But see footnote on p. 10, *supra* [p. 24 of this Appendix].

Petitioner has consistently maintained his absolute innocence of the crime charged. Only one witness at the trial, Max Elitcher, attempted to associate petitioner with the alleged conspiracy. He was an admitted perjurer and, if believed, a co-conspirator with obvious motive and interest in testifying so as to satisfy the prosecution's needs. The false evidence was used as additional proof of petitioner's participation in the conspiracy. If the false evidence had not been offered as corroboration of Elitcher's testimony, the trial court should have directed a judgment of acquittal. Absent this evidence, the jury might well have returned a verdict of not guilty.

The evidence was used to represent falsely that petitioner would not have returned voluntarily to the United States. Moreover, the prosecution suppressed the fact that they had denied him the opportunity to return on his own accord.

Nineteenth: Petitioner did not leave the United States to avoid prosecution or apprehension by the authorities, nor was his departure in any way related to the arrest of Greenglass or a purported involvement in criminal activities. He had committed no crime and had no consciousness of guilt. The criminal authorities had not evidenced any desire to interview or apprehend him, nor was he aware of any reason why they should.* His departure was lawful and not surreptitious and his identity was not hidden. (See paragraphs 28, 29, 32, 57, *infra*.)

Twentieth: The prosecution used the false evidence of a deportation from Mexico to distort petitioner's innocent and lawful departure from the United States. It falsely pictured a desire to visit Mexico as a plan to avoid appre-

* The complaint against petitioner was not issued until August 3, 1950, a month and a half after his departure. It charged five overt acts, none of which were proved in the trial.

hension because of a consciousness of guilt. As a result of the false testimony, petitioner's stay in that country was represented as evidence of his involvement in a criminal conspiracy.

The prosecution utilized the testimony of the claimed deportation by the Government of Mexico to negative any inference that petitioner would have voluntarily returned to the United States. It sought to establish that his delivery to the American authorities was the result of judicial process and official action of the Government of Mexico. Th prosecution knew that its own actions had denied petitioner the opportunity to return voluntarily to the United States. Nevertheless, it sought to establish that petitioner would not willingly return and therefore had to be deported, suppressing the circumstances of his removal.

Twenty-first: The Court in its charge to the jury recognized the importance of this evidence. It related the prosecution's testimony of Sobell's involuntary deportation by the Mexican Government to the evidence of the conspiracy, stating (R. 1559-1560):

> "Finally, the prosecution says that when the conspiracy was uncovered by the arrest of Dr. Klaus Fuchs and later of Harry Gold in February and May of 1950 respectively, the defendants, fearful of being apprehended, attempted to flee and that their attempts to flee followed a pattern which also indicates a preconceived plan—that Morton Sobell did reach Mexico and assumed many aliases there while seeking means of exiting from the country, and that he was apprehended only after being delivered to the United States by the Mexican authorities; that Julius Rosenberg intended to flee the country and that he and Ethel Rosenberg and their children obtained passport photos from Mr. Schneider for that pur-

pose, and that he also asked the Greenglasses to flee, and to further that purpose he gave David Greenglass $5000 and elaborate instructions whereby he could reach Czechoslovakia from Mexico, and that he also asked Dr. Bernhardt as to the required inoculations in order to go to Mexico.

* * *

"I charge you that no inference is to be drawn against the defendants Julius and Ethel Rosenberg because of the incidents relating to Morton Sobell's journey to and trips in Mexico except that *you may consider whether such journey or trips show a preconceived plan as part of the conspiracy* to be followed by the conspirators in attempting to escape the country." (Emphasis supplied.)

The Court then charged the jury as to the significance of the "flight" testimony in other respects, namely, as evidence of consciousness of guilt and corroboration of the other testimony (R. 1559-1560):

* * *

"As to any evidence of flight adduced by the Government in this case, I charge you: Evidence of flight does not create any presumption of guilt, although it is a legitimate ground for an inference of a guilty mind, if the jurors conclude that such inference is justified. Flight is a circumstance which the jury may consider as having a tendency to prove the guilt of a defendant, as an indication of a consciousness of guilt. It should not be considered alone and by itself. It must be weighed with all of the surrounding circumstances, and of course, it should be considered together with all the other evidence in the case in determining the guilt or innocence of these defendants."

Twenty-second: The United States Court of Appeals, in finding Government Exhibit 23A admissible, held that the evidence of deportation was an essential part of the prosecution's case (195 F. 2d at 602):

> "The prosecution introduced as an entry 'in the regular course of business' a card made by an immigration inspector at the time Sobell re-entered the United States, stating that he had been 'Deported from Mexico.' This evidence is attacked as both irrelevant and hearsay. But Sobell's forced return to the United States was certainly relevant to the government's theory that he had fled to Mexico to escape prosecution, for otherwise the jury might have inferred that he had returned voluntarily to stand trial."

Twenty-third: The prosecution itself, in its brief to the United States Court of Appeals, *United States* v. *Rosenberg*, *supra*, pp. 65-66, acknowledged that the claim that petitioner was deported from Mexico was essential to its case:

> "Evidence of Sobell's deportation was plainly relevant on the question of flight. Had it not been for that evidence the jury might have inferred that Sobell returned to the United States voluntarily (perhaps from a vacation in Mexico), and that he had always intended to do so. Thus, proof that his return was involuntary, in conjunction with proof of his activities in Mexico, tended strongly to show that his trip to Mexico was prompted by a desire to escape prosecution. As such it was persuasive evidence of his consciousness of guilt."

The prosecution used the proof of deportation to establish that petitioner's trip, *ab initio*, was to avoid the prosecuting authorities, and that hence his mere presence in Mexico was evidence of guilty flight.

Twenty-fourth: The false evidence necessarily must have imported to the jury that petitioner was engaged in a conspiracy and fled with the intention of permanently removing himself from the United States. Such evidence inferred he had entered Mexico illegally, there had continued his illicit activities, and consequently was deported by the Government of Mexico.

Twenty-fifth: The phrase, "Deported from Mexico," imported to the jury that petitioner's removal was a result of official action by the Government of Mexico, taken over his opposition. The false evidence gave the appearance that petitioner had been subjected to a deportation proceeding in which the evidence presented established a *prima facie* case of petitioner's guilt and caused the Mexican Government to take such drastic action.

Twenty-sixth: The prosecution's claim that petitioner was deported from Mexico came as a surprise to the defense. Petitioner's lack of familiarity with the procedures and laws of Mexico placed him at a severe disadvantage. He was confronted with a certified document of the United States Government and the sworn testimony of an official in the employ of the Department of Justice as well as statements by the prosecution. He conjectured that the evidence might be unassailable. It served to confuse and impede the petitioner's defense. Much time has been required to uncover the proof establishing the prosecution's knowledge of the falsity of the evidence.

THE ABDUCTION FROM MEXICO

Twenty-seventh: The false and prejured evidence was essential to the prosecution's case. The prosecution knew that its agents of the Department of Justice were parties

to the illegal seizure and removal of petitioner to the United States. It knew that he was prevented from returning voluntarily to the United States. The prosecution was aware that his abduction violated international law and treaties, as well as the laws of the United States and Mexico.

Twenty-eighth: On June 22, 1950, petitioner and his family left on a trip for Mexico. Prior to departure they obtained tourist cards in their own names from the Mexican Consulate. Petitioner purchased tickets to Mexico City in his own name from American Airlines, for himself and his family (Exhibit 3). The manifest of the air flight bore the names of petitioner and his family (Exhibit 4). Upon landing in Dallas, Texas, on his way to Mexico, petitioner, to avoid custom duties on his planned return, registered, in his own name, certain camera equipment with United States customs officials (Exhibit 5). Prior to boarding the plane for the flight from Dallas to Mexico City, petitioner was required to show his tourist card (Appendix B, article 75).*

Twenty-ninth: Petitioner arrived in Mexico on June 23, 1950. He and his family were required to show their tourist cards (visas) to the Mexican immigration officials (Appendix B, article 59). The records of the Department of Immigration of Mexico reveal that Morton Sobell bearing tourist card number 70538 entered that day by air from New York (Exhibit 6).** Petitioner, in his own name,

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* Appendices A, B, C, and D to this petition contain respectively the Constitution of the United States of Mexico, the General Law of Population with Regulations of the same, the Law on Extradition of Mexico, and the Regulations of the Preventive Police of the Federal District of Mexico. Pertinent provisions of these Mexican laws have been translated into English for the Court's convenience.

** Exhibits 4 and 6 also show that his wife and children entered Mexico at the same time in the company of petitioner.

rented living quarters for himself and his family (Exhibit 7, petitioner's rent receipts). On his person, petitioner carried his birth certificate, social security card, membership card in a scientific organization, driver's license, and other documents accurately reflecting his identity (Exhibits 8, 9, 10, 11).

Thirtieth: Petitioner would have voluntarily returned to the United States, had it not been for his unlawful abduction on August 16, 1950.

Thirty-first: On the afternoon of August 16, 1950, petitioner and his family had gone on a picnic. They returned to their apartment and were completing their supper when there was a knock on the door. Three Mexicans in civilian clothes, who identified themselves as officers of the Secret Police of the Federal District of Mexico,* entered the apartment and seized the petitioner. They said that petitioner was "Johnny Jones" and was wanted for robbing a bank in Acapulco. Petitioner stated that he was Morton Sobell. He fruitlessly demanded that he have an opportunity to call the United States Embassy to prove his identity and obtain protection. The officers seized and refused to return the credentials he tendered to establish his identity. Additional police came to his apartment.

Petitioner was physically assaulted, rendered unconscious, and placed into an automobile. He was taken to the offices of the *Direccion Federal de Seguridad* of the Federal District of Mexico. There he was assaulted again when he inquired as to the purpose of his detention.

Petitioner was kept in a room under guard until four o'clock of the morning of August 17, 1950. Throughout minutes, the car drove on to the bridge. Prior to crossing

* The Secret Service Police of the Federal District of Mexico are local police limited to the Federal District of Mexico and have no authority to act in immigration matters (Appendix D).

this time, no legal proceedings were held, no hearing was conducted, nor was petitioner presented with any charges or warrant of arrest or written authority for the action taken. He was not seen by any representative of the Mexican immigration or diplomatic services.

Thirty-second: After removing petitioner from his apartment, the police seized Helen Sobell, his wife, and took her to their offices. Petitioner's two children were tended by a neighbor until they, too, were brought to the police headquarters some time later that evening.

Thirty-third: At four o'clock in the morning, petitioner was placed under guard in an automobile. His wife and children were put into a separate automobile in custody of police officers. Both cars then drove north towards the United States. At periodic stops en route, a guard made a telephone call.

Thirty-fourth: At approximately 3:00 A. M. on August 18, after almost a complete day of continuous driving, petitioner arrived in Nuevo Laredo. The car stopped near a public square, several blocks from the international bridge which connects Mexico and the United States. Following another telephone call, a guard informed petitioner that they had received further instructions. After waiting ten over to the American side, an agent of the Federal Bureau of Investigation entered the automobile and instructed the driver to continue to the United States immigration office in Laredo, Texas. The agent stated he had been waiting for petitioner for many hours (R. 1034).

Thirty-fifth: At the United States immigration office, petitioner was removed from the car by the FBI agent and taken before the witness Huggins and was told to sign a card. He was then immediately placed in custody by John

W. Lewis, an FBI agent (R. 1031).* The baggage of petitioner and his wife was examined and various objects removed. In petitioner's presence, one of the Mexican Secret Police turned over to the FBI the personal documents that had been unlawfully taken from him in Mexico City.

Petitioner informed both agent Lewis and Huggins of his unlawful abduction by the Mexican secret police.

Thirty-sixth: Petitioner was then removed to the Webb County Jail in Laredo, Texas, where he was subsequently brought before United States Commissioner Frank Y. Hill. There the FBI agents showed him personal effects which had been stolen from his person and apartment in Mexico and questioned him in respect thereto.

THE EVIDENCE OF DEPORTATION WAS IN FACT FALSE

Thirty-seventh: Petitioner was not deported from Mexico. The power to institute and execute deportation proceedings is vested solely in the Department of Immigration of the Secretariat of *Gobernacion* (Appendices A and B). Records reflecting the entry, status and conditions of departure of all aliens are kept by the Department of Immigration in Mexico City. Local immigration offices are required to maintain similar records (Appendix B).

Thirty-eighth: The records of the Department of Immigration at Nuevo Laredo reveal that petitioner was never deported (Exhibits 12, 13).

Thirty-ninth: Further, records of the Department of Immigration affirmatively establish that the abduction of petitioner and his removal to the United States were executed without the knowledge or approval of the immigration authorities of the Government of Mexico.

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* Petitioner was arrested without a warrant.

Fortieth: When the chief of immigration at Nuevo Laredo first learned of the unlawful transfer of petitioner, he at once communicated with the Department of Immigration in Mexico City, stating that secret service agents of Mexico City had evaded the Department of Immigration in taking petitioner to the United States at 3:45 A. M. on August 18, 1950.

Forty-first: Pursuant to the request of the chief of immigration at Nuevo Laredo, an immediate investigation was made by Hector Rangel Obregon, chancellor of the Mexican consulate in Laredo, Texas.

The consulate acquired some information from American newspapers and further found it necessary to go to the United States immigration officers at Laredo, Texas, to obtain any details of the matter, since the Mexican Government was totally unaware of the facts.

Forty-second: In September 1950, the Department of Immigration advised its office in Nuevo Laredo that steps had been taken to prevent such violations of the laws of Mexico in the future.

Forty-third: The constitution and laws of Mexico afford further proof that petitioner was not deported by its authorities. These enactments establish the rights of aliens, the manner in which a deportation may be effected, as well as the grounds therefor.

Deportation proceedings must be instituted by formal written charges and must be reviewed and approved by the Secretary or Undersecretary of the Secretariat of *Gobernacion*. His decision in turn is reviewable by the courts (Appendices A and B).

No arrest or detention may be carried out without a warrant based on a written charge (Appendix A, article 16). The police of the Federal District of Mexico have no

authority to act in immigration matters (Appendix D). The immigration authorities maintain special places of detention for aliens subject to action by that department (Appendix B, article 74). In the event of deportation, documents are prepared, entries are made in the records of the Immigration Department, and circulars announcing the fact are transmitted to all ports and frontier stations of Mexico (Appendix B; Exhibit 14).

Forty-fourth: The deportee is brought to the frontier, accompanied by immigration officers, and turned over to the local immigration authorities. Docket entries are there made and documents filed. Thence the deportee is taken to the international boundary by the Mexican immigration officials (Appendix B; Exhibit 14). All such procedures are carried out during regular working hours, i.e., between 8:00 A. M. and 6:00 P. M. (Appendix B, article 32). Prior to crossing the border, the immigration authorities of Mexico present a mimeographed form to the alien advising him he may not return, and of the penalty if he attempts to do so (Appendix B; Exhibit 14).

Forty-fifth: The seizure of petitioner in Mexico was carried out by Mexican police having no jurisdiction over the matter. His removal was carried out at a time not authorized by law. No warrant was issued nor written charges made. There were no deportation proceedings. The immigration authorities of Mexico were not parties to the abduction. The records of *Gobernacion* and its Department of Immigration affirmatively show that petitioner was not deported.

THE PROSECUTION KNOWINGLY, WILFULLY AND INTENTIONALLY USED FALSE AND PERJURED EVIDENCE

Forty-sixth: The prosecution knew, long prior to petitioner's trial, that he had not been deported from Mexico.

The prosecution knew, at the very time Huggins testified, that his testimony concerning petitioner's deportation from Mexico was perjurious. The prosecution and Huggins knew, at the very time Government Exhibits 25 and 25A were tendered, that the statement therein, "Deported from Mexico," was false.

Forty-seventh: The prosecution, through its agents in the United States and Mexico, planned and participated in the unlawful seizure of petitioner in Mexico and his removal to Laredo, Texas. The prosecution knew that its unlawful actions had deprived petitioner of the opportunity to return voluntarily to the United States. No other conclusion was open to the jury but that petitioner returned to the United States contrary to his will.

Forty-eighth: Government witness Huggins, an employee of the Department of Justice, was advised and knew that petitioner had not been deported from Mexico, and that the entry to that effect on Government Exhibit 25A was false.

Within a day of petitioner's arrival in Laredo, Texas, Huggins and other employees of the United States immigration office at Laredo, Texas, were informed by Hector Rangel Obregon, chancellor of the Mexican consulate at Laredo that petitioner had not been deported. Sr. Obregon expressed concern and alarm that this matter had been handled without the knowledge or approval of the Mexican Government or its duly constituted authorities.

Forty-ninth: The prosecution and the witness Huggins wilfully, knowingly and intentionally suppressed the fact that they had information directly contradicting the claim that petitioner was deported.

Fiftieth: This information was transmitted to the prosecution. At the very time Huggins was informed by

the Mexican consulate that there was no deportation, FBI agents John W. Lewis, Rex J. Shroder and Leo H. Frutkin were in Laredo, Texas, and in touch with Huggins and the United States immigration office. They had been sent to Laredo, Texas, at the direction of the prosecution.

FBI agent Lewis, who aided the prosecution in its pretrial preparation, sat at the prosecution's table throughout the trial.

Fifty-first: Mr. Saypol was fully informed of the circumstances of petitioner's seizure, from the abduction in Mexico to the time he arrived in Laredo. This is indicated in his statement:

> "* * * we know that she [Mrs. Sobell] was present from the time of the arrest until the time the final act of deportation was effected at Laredo * * *" (R. 1598-1599).

Fifty-second: The prosecution further knew of the facts leading to petitioner's removal to the United States as a result of personal investigations in Mexico by Messrs. Cohn and Saypol, on at least one occasion (R. 1598).

Fifty-third: The prosecution, through its agents and representatives in the United States and Mexico, planned and participated in petitioner's abduction. The seizure was carried out pursuant to its plans and directions. Both agents of the FBI and of the United States Embassy in Mexico City participated in the action.

Fifty-fourth: At approximately 3:00 P. M. on August 16, 1950, the day of the abduction, a United States agent arrived at petitioner's residence (153 Calle de Cordova, Mexico, D.F.), and there interviewed a woman. The agent

showed her a picture of petitioner and asked her for his apartment number. He informed her that petitioner was a criminal, sought by the authorities of the United States for kidnapping a child. She suggested to the agent that he return in three hours to obtain this information from the superintendent of the building.

Fifty-fifth: At approximately 6:00 P. M. that day, a young woman arrived in a taxi, approached the same woman and identified herself as a cashier in a supermarket. She described petitioner and his family and asked in what apartment they lived, explaining that she sought the return of money given them by mistake. Upon receiving the information, she did not enter the house but immediately departed. A few hours later, a Mexican in civilian clothes approached one of the residents of the apartment house, displayed a Secret Police badge, and told her that petitioner was a criminal. He requested that no one be informed of petitioner's anticipated seizure.

Fifty-sixth: Later that same evening, Senora Elizabeth Avila De Soto, who was employed as a domestic worker by the Sobells, was informed upon arriving at the apartment that petitioner and his wife had been taken away by the police and that the children were in the care of Senora Rios (wife of Government witness Rios). At approximately 10:00 P. M. on August 16, 1950, Mexican Secret Service Police again came to petitioner's apartment. They advised Senora De Soto that they were the ones who had seized petitioner and his wife, and were going to search the premises. They stated that they were acting as agents and representatives of the United States Government.

They searched the apartment, opening a wall safe, and removed money, papers of petitioner and his wife, and all their personal effects. Over Senora De Soto's objections the police also took her clothing and belongings.

Fifty-seventh: Senora De Soto was again visited by the same Mexican Secret Service men several days after the kidnapping and interrogated at length. In reply to their questions she informed them that petitioner and his family had not acted in a suspicious manner and had not sought to hide their identity.

At this interview Senora De Soto requested that the police return her property they had taken on the night of the abduction. The officers told her that the United States Embassy was holding her belongings and that she should go there to request their return.

Fifty-eighth: On the night of the kidnapping, Senora Rios was visited by several of the Mexican police officers who had seized petitioner. Two days later they returned, accompanied by an agent of the FBI, who interviewed both Sr. Rios and his wife. The agent exhibited a photostatic copy of an envelope which he stated was taken from petitioner's apartment, and made inquiries relating thereto.

Fifty-ninth: Within a period of ten days after the kidnapping, Rios was seen by the FBI on three occasions and at least in one instance was taken to the United States Embassy for interrogation. Approximately a month after the kidnapping, he was visited at his place of business by prosecutors Roy Cohn and Irving Saypol and an FBI agent.

Sixtieth: The prosecution, acting in Mexico through the United States Embassy, the FBI and the Secret Police of Mexico City, engaged in a coordinated scheme to seize petitioner, prevent his voluntary return to this country, and circumvent the protection afforded him by the Consti-

tution and laws of Mexico and the Treaty on Extradition.* The United States Embassy and the FBI in Mexico worked with the Mexican Secret Police on the day of the abduction and thereafter. The United States Embassy in Mexico City served not only as a place of interrogation, but took custody of some of the property and documents seized from petitioner's apartment by the Mexican Secret Police.

Sixty-first: The circumstances surrounding the delivery of petitioner to the FBI in Laredo, Texas, provide further proof that the prosecution had knowledge of the time and manner of his seizure and coordinated its actions with the Secret Police in Mexico City from the very beginning.

Sixty-second: After the Mexican Secret Police had brought petitioner to the offices of the *Direccion Federal de Seguridad*, the American authorities were notified that he had been seized. Agents Lewis, Frutkin and Shroder thereupon proceeded to Laredo, Texas, to take petitioner into custody.

Sixty-third: While carrying petitioner to Laredo, Texas, the Mexican Secret Police made periodic phone calls, indicating their progress and expected time of arrival. Huggins and L. C. Taylor, agent of the FBI stationed in Laredo, Texas, working with the New York agents, made the necessary arrangements to receive petitioner. Aware of the fact that Helen Sobell and the children were also arriving, the FBI obtained the assistance of a doctor, as well as of a matron to tend to the children. All of these persons

* Seizure of petitioner in Mexico, not authorized by warrant, violated its Constitution and laws (see Article 16 of the Constitution of Mexico).

were present at the time of petitioner's arrival at approximately 3:45 A. M. on August 18, 1950.

Sixty-fourth: Petitioner's arrival in Laredo, Texas, was fully anticipated by the prosecution. Huggins acknowledged that he had been waiting for petitioner (R. 1034). The Mexican Secret Police advised the FBI when they were about to cross over to the United States. An FBI agent then left the United States, walked over to the Mexican side of the bridge and entered petitioner's car. The agent acknowledged they had been expecting him for several hours.

After petitioner was brought into the United States immigration office, one of the agents said, "I hated to do it this way, but it was the only way we could."

Sixty-fifth: After being temporarily detained by the United States immigration officers, Helen Sobell asked Huggins whether, if she so desired, she could reenter Mexico. Huggins, knowing that neither petitioner nor his wife had been deported, was unable to make a responsive answer. Neither he nor any of the FBI agents ever claimed Mrs. Sobell had been deported. Ignoring the Mexican police who were present at the time, Huggins discussed the matter with the FBI and then told Mrs. Sobell that she should not return to Mexico, because the American authorities did not wish her to do so.**

Sixty-sixth: Pursuant to the directions of the prosecution, the Mexican Secret Police delivered the documents and belongings of petitioner which they had seized in Mexico City to agents of the Federal Bureau of Investigation

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** Contrary to the notation found on Government Exhibit 25-A Mrs. Sobell was not deported.

in Laredo, Texas.* These documents were in turn transmitted to the prosecution along with information on how they were obtained.

Sixty-seventh: The prosecution used the unlawful search and seizure as a means of suppressing evidence which would have been helpful to petitioner in establishing his innocence. Among the documents seized were petitioner's tourist card (visa), which evidenced his lawful entry into Mexico, and his vaccination certificate, which was obtained in preparation for his return to the United States. To this day these documents have not been returned.**

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* A number of these items bear the notation "R.I.S., 8/18/50" indicating their delivery to Rex I. Shroder, FBI agent from New York, who was present in Laredo at the time petitioner was brought there by the Mexican police.

** In addition to the items mentioned above, there are other documents and personal property which have never been returned. Petitioner was never given a receipt for the property taken.

It was not until September 17, 1954, that the FBI returned to petitioner some of the items which were stolen from him, including his wallet, a round trip airline ticket, and a receipt from the Bureau of Customs dated June 23, 1950, at Dallas, Texas. The latter item establishes that petitioner did not enter Mexico surreptitiously, but proclaimed his identity and destination, and indicated an intention of returning to the United States. (See Exhibit 5.)

It was not until December 22, 1954, that a further partial return of petitioner's personal effects took place. Among these items were his birth certificate, operator's license, social security card and rent receipts. (See Exhibits 7, 8, 9 and 11.) Subsequently, in 1955, the FBI sought to return a pair of glasses purportedly belonging to petitioner. It was at this time that request was made in his behalf that the authorities return the rest of the personal effects unlawfully taken and held by the Department of Justice.

Sixty-eighth: The prosecution and the FBI were fully cognizant of the fact that extradition was the lawful procedure to obtain custody of petitioner.***

Sixty-ninth: The United States and Mexico are bound by a treaty on extradition which specifies the grounds for extradition and the procedures to be followed by the signatories.§

Seventieth: The prosecution knew that petitioner could not be extradited. The crime with which he was charged, conspiring to commit espionage, is not a ground for extradition under the aforesaid treaty (Article II). The treaty specifically excludes extraditions for crimes of a political

*** See 82nd Cong., 1st Sess., House Committee on Appropriations, Hearings, *Department of Justice Appropriations for 1952*, testimony of J. Edgar Hoover, Director, Federal Bureau of Investigation, February 15, 1951, p. 312. Mr. Hoover revealed not only his knowledge of extradition proceedings as the means of lawfully obtaining custody of a United States fugitive, but further his close cooperation with the police officials of Mexico City. He stated:

> "There are many fugitives in this country who would never have been located had it not been for the service rendered to law enforcement by the Identification Division. This service extends not only through the identification of persons who have become fugitives from justice within the United States, but also outside of the United States.
>
> "Recently we received the fingerprint record of a man arrested by the Mexican police in Mexico City for fraud. A check of our files revealed that he was wanted in California as a parole violator. As a result of this identification, this man would be extradited and sent back to the penitentiary in California."

§ Treaty on Extradition between the United States and Mexico, signed on February 22, 1899, at Mexico City, 31 Stat. 1818. This treaty was supplemented in 1902, 1925, and 1936.

nature (Article III, paragraph 2).* Yet the prosecution adduced evidence of petitioner's purported political association and activities as an aggravating and motivating element of the offense.**

Seventy-first: Moreover, the prosecution would have been required to present proof at a hearing before a Mexican court, to prove the *corpus delicti* and to adduce evidence to establish the probable guilt of petitioner. The court's judgment would have been subject to examination by the President and review by another court.***

Seventy-second: Had the prosecution complied with the requirements of the extradition treaty, petitioner would have expressed his desire and intention of returning voluntarily to the United States. Thus the prosecution would have been unable to claim that petitioner's trip to Mexico constituted evidence of guilty flight, and that petitioner did not voluntarily return.

Seventy-third: The prosecution and the agents of the FBI avoided the problems posed by the treaty on extradition by arranging for the seizure of petitioner by the Mexico City Secret Police without the knowledge or approval of the Mexican Government.

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* The Treaty of Extradition must be read in light of the Extradition Law of the United States of Mexico which provides that an alien may not be extradited from Mexico if the offense is connected with matters of a political nature (Appendix C, article 4).

** See testimony of Elizabeth Bentley (R. 964-1024); charge of the Court to the jury (R. 1558); comments on sentencing (R. 1601-1603; 1612-1615).

*** Law of Extradition of the Republic of Mexico, May 19, 1897. Appendix C. Article 8, Convention between the United States of America and Other American Republics, signed at Montevideo, December 26, 1933. U. S. Treaty Series No. 882.

Seventy-fourth: In the execution of this plan, the FBI utilized its close relationships with the local police officials.§ The FBI over the years had agents in Mexico who conducted investigations on behalf of the United States in coordination with Mexican police authorities.§§ These activities were known to be unlawful and in violation of the sovereignty of Mexico.*

§ See footnote 3, p. 15, *supra* [p. 34 of this Appendix].

§§ See statement of J. Edgar Hoover, Director of the Federal Bureau of Investigation, at the 52d Annual Meeting of the International Association of Chiefs of Police, Miami Beach, Florida, December 10, 1945:

> "It was our happy privilege to be closely associated with the security and intelligence authorities in the British Isles * * * and with similar agencies in all of the countries in the South from Mexico to Chile.
>
> "* * * FBI liaison agents, stationed from Canada to the tip of South America, received the highest degree of aggressive cooperation."

See also, *The Story of the Federal Bureau of Investigation*, Department of Justice, 1945, p. 12, stating that "FBI liaison agents" were stationed in and cooperated with police officials in all the countries of Latin America.

* See the statement of the Secretary of Foreign Relations, November 22, 1951, in response to Mexican protests of FBI activity in that country:

> "There exists no agreement between our government and any other by virtue of which foreign investigation agents and police may carry out activities in the Republic.
>
> * * *
>
> "It is proper to make it clear that activities of this nature, on national territory, would imply an intervention in affairs that are the exclusive jurisdiction of the Government of Mexico and, as such, would be repugnant to the standards of international law and would constitute a violation of our sovereignty which the Government of Mexico cannot in any way tolerate, much less consent to * * *."

Seventy-fifth: In addition, the events of the morning of August 18, 1950, the circumstances surrounding petitioner's delivery, the information subsequently obtained from Mexico, and the later investigations, all clearly revealed to the prosecutors as well as to the agents and employees of the Department of Justice involved the facts of petitioner's seizure.

Seventy-sixth: Upon arriving in Laredo, Texas, petitioner immediately informed the FBI and United States immigration officials that he had been kidnapped, physically assaulted, accused of robbing a bank in Acapulco, presented with no written charges or warrant of arrest, and that no proceedings had been held in Mexico.

Seventy-seventh: Huggins and FBI agent Taylor, both employees of the Department of Justice, were fully cognizant of the procedures followed in deportation and extradition cases. They knew which agencies of the Mexican Government had jurisdiction over such matters.

The FBI regularly assigns one of its agents to work with the immigration offices at each United States port of entry. In August, 1950, agent L. C. Taylor, was stationed at Laredo, Texas, for these purposes. In the course of their duties, both he and Huggins were in contact with the local Mexican immigration officials. Both Huggins and the FBI well knew that it was the secret police of Mexico City who seized and delivered petitioner (Government Exhibit 25A, R. 1030).

Seventy-eighth: The FBI and Huggins noted that petitioner arrived at 3:45 o'clock in the morning. His appearance clearly indicated that he had been physically assaulted. They were aware that the required deportation procedures had not been complied with. Petitioner's exit had not been processed by Mexican immigration authorities in Nuevo

Laredo. He had not received or signed the necessary documents, requisite for all deportees, prior to leaving Mexico.** The FBI and Huggins knew that no Mexican authorities, not even the secret police, claimed that petitioner was deported (R. 1026-1027, 1035-1036).

Seventy-ninth: In the event of a deportation, the Mexican Government advises the United States Embassy in Mexico City of the pending action.* The Embassy thereupon notifies the United States immigration authorities at the point of entry. In the present case, the Embassy was not so informed, nor did it so advise the immigration offices at Laredo, Texas.

Eightieth: The report on the investigation conducted by Chancellor Hector Rangel Obregon of the Mexican Consulate in Laredo (see paragraph 41, *supra*) was sent to the Mexican Embassy in Washington, D. C. That Embassy, upon information and belief, made representations in the matter to the United States Government.

Eighty-first: For a period of months after petitioner's abduction, the prosecution conducted an investigation in

** Prior to deportation the immigration office of Mexico at the point of exit requires a deportee to sign a statement that he will not return without the express permission of the Secretariat of *Gobernacion* (Exhibit 14).

* "In all cases in which a national of one of the high contracting parties is to be deported or expelled from the territory of the other, and in the cases in which a national of either country subject to deportation is allowed voluntarily to depart for the country of his nationality in lieu of deportation, due notice will be given the proper consular representative of the country of such national."

Article VII, Convention between the United States and Mexico to Prevent Smuggling and for Other Purposes, signed at Washington, December 23, 1925. U. S. Treaty Series No. 732.

Mexico to obtain evidence for the trial.** This investigation was carried out by agents of the FBI in close cooperation with local police officials as well as the United States Embassy in Mexico. On behalf of the prosecution, Edwin L. Swift visited and interviewed Government witnesses Espinosa and Broccado in Vera Cruz and Bautista in Tampico.

Eighty-second: The prosecution was acquainted with the facts set forth above (paragraphs Seventy-fifth through Eighty-first) through reports and information received from the FBI and the United States immigration authorities.

Eighty-third: Mr. Saypol, in opposition to petitioner's motion for arrest of judgment, knowingly represented to the Court that the affidavit submitted in support thereof was false, stating that petitioner was deported and that his very entry into Mexico was illegal (see Paragraph 17, *supra;* R. 1598-1599). He sought thereby to discredit the affidavit in the eyes of the Court.

Eighty-fourth: As set forth in the present petition, the prosecutor well knew that petitioner had lawfully entered Mexico with a tourist card (visa) and had not been deported from Mexico (see Exhibits 6 and 12).

Eighty-fifth: Petitioner was denied a fair trial and deprived of his constitutional rights. The prosecution's knowing use of perjured evidence and its suppression of the facts destroyed the validity of the proceedings and the sentence based thereon.

Petitioner has been wrongfully caused to suffer a thirty-year sentence. He has been incarcerated in Alcatraz Penitentiary. The punishment of petitioner and his family has

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** Prosecutors Cohn and Saypol traveled to Mexico on at least one occasion to participate in the investigation (paragraph 52, *supra*).

been cruel and extreme. But beyond such humanitarian considerations, the law demands rectification of this miscarriage of justice.

As Mr. Justice Frankfurter recently stated:

> "The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts."

To restore the integrity of the administration of justice the relief sought herein should be granted.

WHEREFORE, petitioner asks that upon this petition, the Court

(1) Grant a hearing to determine the issues and make findings of fact and conclusions of law with respect thereto; and upon such findings of fact and conclusions of law vacate and set aside the sentence and judgment of conviction and discharge petitioner forthwith from detention and imprisonment or in the alternative grant him a new trial;

(2) Order that petitioner be present at the hearing aforesaid; and for such other and further relief as to the Court may seem just and proper in the premises.

Dated, May, 1956.

MORTON SOBELL,
By His Attorneys,

DONNER, KINOY & PERLIN,
342 Madison Avenue,
New York, New York.

BENJAMIN DREYFUS,
57 Post Street,
San Francisco, California.

[The Exhibits and Appendices A to D attached to this petition have not been printed, but photostatic copies have been filed with the Court.]

Affidavit of Paul W. Williams, Read in Opposition to Motion of May 8, 195[illegible]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

PAUL W. WILLIAMS, being duly sworn, deposes and says:

1. I am the United States Attorney for the Southern District of New York and appear for the United States of America in opposition to this motion. The facts contained in this affidavit are stated upon information and belief based upon the files and records in this case.

2. The moving papers of the defendant Morton Sobell and the files and records of this case conclusively show that the prisoner is entitled to no relief. The alleged grounds for Sobell's petition are that the prosecuting authorities intentionally (1) "used false and perjurious testimony and evidence", (2) "made false representations to the court", and (3) "suppressed evidence". This affidavit will show that in the light of the record in this case these contentions are completely untenable.

SOBELL'S GUILT WAS MADE ENTIRELY CLEAR BY SUBSTANTIAL EVIDENCE WHICH THE JURY BELIEVED, AND WHICH SOBELL DOES NOT NOW ATTACK

3. The testimony and evidence which Sobell alleges was false was the testimony of Immigration Inspector

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James S. Huggins and Government Exhibit 25, a manifest bearing the notation "Deported from Mexico" which Huggins prepared on the return of Sobell to the United States. It will be demonstrated below that Sobell's petition itself establishes the accuracy of this evidence. At the outset however it is important to place the evidence in its context. Sobell asserts that this evidence was essential to the prosecution's entire case against petitioner. Yet the charge upon which the Trial Judge sent the case to the jury stated in part:

> "* * * to determine whether Morton Sobell is a member of the conspiracy, you are only to consider the testimony of Max Elitcher, William Danziger and the testimony relating to the defendant Sobell's alleged attempt to flee the country. *If you do not believe the testimony of Max Elitcher, as it pertains to Sobell, then you must acquit the defendant Sobell.*" (2353) (Emphasis Added)

On that charge the jury rendered a verdict of guilty against Sobell. The jury therefore, believed the testimony of Max Elitcher. The present attack upon the judgment of conviction should be considered in the light of the facts established by the testimony of Max Elitcher, William Danziger and the evidence of Sobell's attempt to flee the country. A recital of those facts will serve to place in proper perspective the evidence which Sobell now attacks in his attempt to set aside the judgment.

SOBELL'S PARTICIPATION IN THE ESPIONAGE CONSPIRACY WAS ESTABLISHED BY THE TESTIMONY OF ELITCHER

4. The testimony of Elitcher which the jury believed established the following facts:

Affidavit of Paul W. Williams, Read in Opposition to Motion of May 8, 1956

5. In 1939 Morton Sobell and Max Elitcher, former classmates at college, roomed together in Washington, D. C., where both worked at the Bureau of Ordnance of the Navy Department (264, 296-7).* Elitcher at this time was a member of the Communist Party in Washington, having joined through efforts of Sobell (264-8). As chairman of Elitcher's Communist Party group, Sobell instructed the members to continually support the cause of Soviet Russia (R. 299-305). Sobell remained in the group until he left Washington in September, 1941 (297, 305, 312).

6. In June 1944, Julius Rosenberg, another former classmate of Elitcher, came to Elitcher's home. At this time Elitcher was in the Fire Control Section of the Bureau of Ordnance working on computers for anti-aircraft fire control. This was classified military information. Rosenberg stated that the war effort of the Soviet Union was being impeded because some interests in the United States were denying it the benefit of a good deal of military information (270-1). To counteract this, he explained, many people were furnishing the Soviet Union with classified military information. He asked Elitcher to obtain information about military equipment and turn it over to be supplied to the Soviet Union (270-1). Rosenberg asked about any plans or blueprints or anything that might be of value. He said that such information should be taken to New York to him where it would be processed photographically. He assured Elitcher that this would be done in a very safe manner, that is, it could be brought one night, processed immediately, and returned before it was missed (275). To further reassure Elitcher, Rosenberg confided that Sobell was among those who were giving him military information for transmission to Russia (315-17).

* Page references are to the typewritten transcript of the trial minutes.

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7. A few months later while on a camping trip Elitcher told Sobell that Rosenberg had visited him, requested him to contribute military information to Russia, and informed him that Sobell was among the contributors (320-1). At this point Sobell declared that Rosenberg "should not have mentioned my name. He should not have told you that" (320-1).

8. After the war Morton Sobell persisted in attempting to secure classified information for Rosenberg. In the course of his Navy Department duties Elitcher had occasion to visit from time to time the General Electric plant in Schenectady where Sobell was then working (329). Sobell inquired as to what work Elitcher was doing, and Elitcher told Sobell that he was in charge of the development work on a new fire control system. Sobell asked if Elitcher could get any reports on the system. Elitcher replied that only some reports of little importance were available at the time. Sobell asked if an ordinance pamphlet were available, an ordinance pamphlet being an overall description of the system, and Elitcher replied that the pamphlet had not yet been completed (329-333). On another visit later on in 1946, Sobell again asked about the status of the ordinance pamphlet (334). Upon being informed that the pamphlet was not yet completed, Sobell suggested that Elitcher see Julius Rosenberg in regard to it (335).

9. Elitcher followed Sobell's suggestion and saw Rosenberg in New York. He told Rosenberg about his work in charge of the development of a new fire control system. Rosenberg interrupted and said there was a leak in his espionage setup which was causing some difficulty and that it was necessary to take some precautions. He told Elitcher it would be best not to see him further until notified to do so (338-40).

Affidavit of Paul W. Williams, Read in Opposition to Motion of May 8, 1956

10. Sobell himself had access to important military information. While he was employed by General Electric he worked on Servo mechanisms which were used to control military equipment. These mechanisms take intelligence information and reproduce it mechanically or electrically (334). A great deal of Sobell's work was research on projects for the United States Government. Sobell became an expert in this line and was doing very important work at General Electric (485). It may be noted that David Greenglass testified that Rosenberg said he had contacts in upstate New York, including one at the General Electric Company in Schenectady who furnished him with information (731-2).

11. In the latter part of 1947 Sobell shifted his employment from General Electric to the Reeves Instrument Company in New York City (342). He continued to work on classified military projects and was in an important position overseeing the work of others in addition to doing his own work (343, 484-5). Reeves Instrument Company was doing military work for the Armed Forces in connection with fire control systems and radar (281). Sobell was in charge of the development of a plotting board (343).

12. At about this time Elitcher visited the Reeves Company and saw Sobell. Over luncheon Sobell asked whether Elitcher knew of any engineering students or engineering graduates "who were progressive, who would be safe to approach on this question of espionage, of getting materials." Elitcher replied that he did not, but that if somebody came along he would let Sobell know (276-7, 344). Sobell said the intent of getting these people was in order to approach them concerning espionage if they could get in a position where classified military information would be available to them (279).

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13. Elitcher then informed Sobell that he was having difficulty with his wife. Sobell became very concerned and asked Elitcher whether his wife knew anything about "this espionage business" (344). Elitcher said he thought she might know something but that he wasn't sure. Sobell replied "Well, that isn't good" (345).

14. In October, 1948, Elitcher went to work for the Reeves Instrument Company and lived close to Sobell. Elitcher and Sobell drove to work together. Sobell again sought from Elitcher the names of persons who might be recruited for espionage work, and added that because of some increased security measures, it would be best to find engineering students who were not involved in any progressive activity so that they would not be suspected (345-6).

15. Before Elitcher left the Bureau of Ordnance to go to the Reeves Instrument Company he told Sobell of his decision to leave the Bureau. Sobell said that before Elitcher acted on this decision he should talk to Julius Rosenberg. Sobell said "Don't do anything before you see him. I want to talk to you about it, and Rosenberg also wants to speak to you about it." Accordingly, Elitcher met with Sobell and Rosenberg. At this meeting Rosenberg said he was sorry to hear of Elitcher's decision to leave the Bureau of Ordnance because he needed somebody to work at the Navy Department for this espionage business. Rosenberg asked Elitcher to change his mind. Sobell agreed with Rosenberg in his trying to convince Elitcher to stay down at the Bureau of Ordnance. Elitcher, however, decided not to change his plans (346-9).

16. At the end of July and the beginning of August, 1948, Elitcher drove up to New York from Washington

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in order to look for a place to live, and went to Sobell's house to stay. Upon arrival at Sobell's house, he told Sobell that he thought he had been followed by one or two cars from Washington to New York. At this point, Sobell became very angry and said that Elitcher should not come to the house under those circumstances. Sobell told Elitcher that he should leave the house and go some other place to stay. After some further conversation, Sobell finally agreed that Elitcher should stay and did not seem to believe that Elitcher had been followed (352-3).

17. Sobell then said that he had some valuable information in the house, something that he should have given to Julius Rosenberg some time ago and had not done so; it was too valuable to be destroyed and yet too dangerous to keep around. Sobell said he wanted to deliver it to Rosenberg that night. Elitcher told Sobell that it was a dangerous and silly thing to do. Sobell, however, insisted and asked Elitcher to go along. After some argument, Elitcher agreed to go. Sobell took with him a 35 millimeter can of film (354).

18. Upon getting into the car, Sobell put this film into the glove compartment. Sobell drove to Manhattan and parked outside the Journal American Building, which was near Knickerbocker Village and the apartment of Julius Rosenberg. There Sobell took the can from the glove compartment and left (354-5, 459).

19. Pursuant to Sobell's instructions, Elitcher parked the car facing the East River Drive on Catherine Slip. Sobell returned in about half an hour and as they drove off Elitcher said to him: "Well, what does Julie think about this, my being followed?". Sobell said: "It's all right; don't be concerned about it; it's o.k.". Sobell then

said Rosenberg told him he once talked to Elizabeth Bentley on the phone but he was pretty sure she didn't know who he was and everything was all right (354-5).

20. The testimony of Elitcher on direct examination and cross, which the jury heard and believed, therefore clearly established that Sobell was a full-fledged participant in a conspiracy to commit espionage on behalf of the Soviet Union.

EVIDENCE NOT HERE ATTACKED ALSO ESTABLISHED THAT SOBELL'S FLIGHT TO MEXICO WAS PURSUANT TO A PREARRANGED PLAN TO ESCAPE TO RUSSIA

21. The evidence of the pattern of escape of the conspirators shows that in 1950 law enforcement authorities were closing in on the Rosenberg spy ring. This occasioned Rosenberg to outline a pattern of flight for David Greenglass and his wife, which would take them to Mexico, then via the seaport of Vera Cruz to Europe and ultimately to the Soviet Union (745-50, 1019). Shortly after Greenglass and Harry Gold were apprehended, Sobell began to follow the very same pattern (251-2).

22. Accompanied by his immediate family, he went to Mexico City, where he falsely explained to a neighbor that his departure from the United States was prompted by a desire to avoid military service (1348-50, 1417-19). From Mexico City he went to Vera Cruz and Tampico, the two leading seaports of Mexico, using no less than five false names (1358-72). He even took the precaution of sending letters to relatives in the United States through an intermediary, William Danziger, and in so doing used still other fictitious names on the return address (1252-56). His apprehension and return to the United States by the

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Mexican police prevented him from successfully perfecting his flight out of Mexico to points abroad (1525-26).

23. On the trial, Sobell did not contest the evidence of his statement in Mexico City to Manuel Giner de los Rios that he wished to leave Mexico because he wished to avoid the authorities of the U. S. Army who were looking for him. There was no cross-examination of this witness, nor did defense counsel cross-examine the witnesses establishing the use of fictitious names by Sobell in the course of his trip to the port cities of Vera Cruz and Tampico (1356-73). Sobell does not now attack this evidence.

24. The record of evidence not now challenged therefore establishes not only his participation in the espionage conspiracy but also the evidence of flight from which the jury could properly draw an inference of his consciousness of guilt.

25. Since the trial Sobell has acknowledged not only his use of aliases in Mexico but also that he made inquiries about passage to Europe and South America for all his family. In an affidavit dated September 23, 1953, filed with the Court of Appeals for this Circuit in opposition to the motion of the United States Attorney for affirmance of the decision of this Court denying Sobell relief under his previous motion under Section 2255, Sobell admitted the use of fictitious names and stated that "I left the family in the Mexico City apartment and travelled around Mexico to Vera Cruz and Tampico, even using false names and inquiring about passage to Europe and South America for all of us." (His affidavit goes on to contend that he had changed his mind and intended to return to the United States when apprehended.)

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26. He therefore does not challenge the facts established by the evidence of flight, but only urges that the jury should not have drawn any adverse inference from the facts. That, however, was clearly a matter for the jury to decide.

SOBELL'S PRESENT CONTENTION THAT THE EVIDENCE OF HIS DEPORTATION WAS ESSENTIAL TO THE PROSECUTION'S CASE IS AN AFTERTHOUGHT

27. Upon his summation, counsel for Sobell recognized that the jury's verdict with respect to Sobell depended primarily upon the testimony of Elitcher:

> "Will you tell me if you take Elitcher's testimony out of this case, is there any conspiracy against us?" (2240-41).

28. Sobell's present contention that the evidence of his deportation from Mexico was essential to the prosecution's entire case is also contradicted by the brief submitted for him by his attorneys in the Court of Appeals on appeal from his conviction. At that time Sobell's contention was that the evidence was completely irrelevant and stated:

> "There was no issue before the jury which could possibly have made the card relevant evidence on this trial. The only remotely relevant fact which it tended logically to establish was that Sobell had been in Mexico. This, however, had already been five times proved and thrice conceded. It is evident that the whole purpose and intent of the prosecutor was to impugn the defendant Sobell as one who had committed some offense for which he had been found to be unworthy of the privilege of residence by the Mexican government.

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"There is not any doubt about this, or how the jury would have taken it. Deportation is commonly understood to mean 'The sending back of an undesirable or criminal alien to the country whence he came'. (Funk & Wagnalls, New Standard Dictionary). *The jurors could have taken no view of the matter save that the Mexican authorities had found the person or the conduct of Sobell offensive to them.*" (emphasis added) (Brief of Morton Sobell, p. 57).

29. The Court of Appeals pointed out that the evidence was not irrelevant and that

"* * * Sobell's forced return to the United States was certainly relevant to the government's theory that he had fled to Mexico to escape prosecution, for otherwise the jury might have inferred that he had returned voluntarily to stand trial" (195 F. 2d at p. 602).

30. Counsel for Sobell have now accepted the relevance of this evidence, which they earlier refused to recognize, and now assert that the evidence was of such a high order of materiality that it was essential to the prosecution's case. True evaluation of the significance of this evidence lies between these two extremes. The evidence was relevant and was one item among many showing the pattern of Sobell's attempt to escape from justice.

THE EVIDENCE THAT SOBELL WAS "DEPORTED FROM MEXICO" WAS NOT FALSE. "DEPORTED" IS AN APT WORD TO DESCRIBE HIS FORCED RETURN TO THE UNITED STATES

31. Sobell contends that the notation "Deported from Mexico" was false. His own petition, despite its inac-

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curacies, distortions and untruths, only confirms the accuracy of that notation. To deport means to take or send away forcibly or to banish. Funk & Wagnalls New Standard Dictionary (1949 ed.) gives as the first definition of the verb "deport":

> "to carry off or away; transport, especially to take or send away forcibly, as to a penal colony; banish, as, the prisoners were deported by boat * * *"

There can be no doubt that the evidence established and Sobell's petition confirms that he was deported from Mexico. Sobell was ejected from Mexico against his will, and the word "deported" accurately describes that situation.

32. Sobell's quarrel with the evidence apparently stems from the fact that he was deported by the Mexican Security Police rather than by the Mexican Immigration Service. He contends that "deported" connotes action by the immigration authorities.

33. This contention is in substance no more than a quibble that the witness Huggins should have written "ejected" instead of "deported". Moreover, the relevance of the evidence was simply to show Sobell's forced return to the United States. Surely it was immaterial for this purpose whether the Mexican Security Police or the Mexican Immigration Service accomplished his forced return.

34. The jury could not have been misled in any respect. The Court ordered the prosecution to produce the witness who made the notation. Inspector James S. Huggins testified that he made the notation as a result of his own observation, that this was a customary thing for him to do as an Immigration Inspector in cases of similar char-

acter, and it was something he did as a part of his duty. Huggins testified that the Mexican Security Police brought Sobell into his office. He stated that the information contained in the words "Deported from Mexico" was not anything which had been given him by the Mexican authorities, nor was it based upon any Mexican documents, and that it merely expressed his own observation (1520-34). His testimony accurately informed the jury of the facts of Sobell's departure from Mexico as observed by Huggins.

35. Had counsel desired to cross-examine Huggins further to establish what he meant by the use of the word "deported" they were at liberty to do so.

36. Sobell now argues that the notation "Deported from Mexico" tended to indicate that he would not have returned voluntarily to the United States. The inferences to be drawn from the evidence were for the jury. Sobell had every opportunity to present any evidence which he wished to bring to the jury's attention. He introduced none and cannot now complain if the jury found that the evidence against him established his guilt beyond a reasonable doubt.

37. Sobell raised this very contention in the Court of Appeals on appeal from his conviction. The Court stated:

> "In his reply brief, Sobell says: 'We do not contend, as the Government intimates, that its violation of domestic or international law exempts Sobell from trial, but merely that he should be restored the choice * * * of entering the United States voluntarily or involuntarily * * *.' What was violated was his right to be free from unlawful molestation or assault by his own Government; and his right not to be convicted by an "admission" wrested from

him by a violent act.' It seems particularly inconsistent, therefore, for Sobell not to have introduced evidence, during the trial, of his kidnapping to contradict the government's evidence of legal deportation." 195 F. 2d at page 603. Footnote 20.

THE FLIMSY CHARGE THAT THE PROSECUTOR MADE FALSE REPRESENTATIONS TO THE COURT IS ON ITS FACE ABSURD

38. The charge that the prosecutor made false representations to the Court amounts to no more than this: In support of a motion in arrest of judgment, Sobell submitted an affidavit concerning the circumstances of his departure from Mexico. This affidavit stated that on his apprehension Sobell tried t show his visa to the Mexican Security Police. The prosecutor then pointed out to the court that this could not have been true because Sobell did not go into Mexico with a visa (2424).

39. Sobell now asserts that this was a wilful false representation to the court of sufficient magnitude to be considered as one of the grounds for setting aside his conviction. He does this by equating a visa with a tourist card. Both a visa and a tourist card can serve as an expression of permission by one Government for a citizen of another country to enter its borders. A visa, however, is customarily endorsed upon a passport; a tourist card is a separate travel document not annexed to a passport. The prosecutor was correct when he said that Sobell did not travel into Mexico with a visa. What Sobell had when he went to Mexico was a tourist card.

40. Furthermore, this statement, made in the course of argument upon a motion in arrest of judgment after

all of the evidence had been presented and after the jury had rendered its verdict of guilty, obviously had no effect whatsoever upon the conviction of the defendant Morton Sobell. The context likewise clearly shows that the Court's decision denying the motion in arrest of judgment was made upon grounds far more substantial than whether Sobell did or did not possess a visa upon his entrance into Mexico (2403-25).

THE MOVING PAPERS FAIL COMPLETELY TO SUPPORT THE CHARGE OF SUPPRESSION OF EVIDENCE

41. Apart from the baseless allegations with respect to the evidence of Sobell's deportation from Mexico, the charge that the prosecution suppressed evidence seems to rest upon paragraphs Sixty-Sixth and Sixty-Seventh of the petition. These paragraphs allege the suppression of documents taken from Sobell by the Mexican Secret Police at the time of his apprehension. The petition alleges that these documents were transmitted to the prosecution. These included Sobell's tourist card and a vaccination certificate. The allegation that these documents would have been "helpful to petitioner in establishing his innocence" is the statement of a conclusion which this court is under no obligation to accept.

42. If, however, Sobell or his counsel considered that these documents would in any way have tended to establish his innocence, they should have sought the introduction of those documents into evidence at the trial. There is no allegation whatsoever in the petition of any attempt by the defense to obtain the production of these documents under Rule 16 of the F. R. Cr. P. The petition is completely barren of any explanation as to why the defense failed to take any steps to obtain the inspection or intro-

duction into evidence of these documents at the trial. Sobell does not claim to have been in any ignorance as to the whereabouts of these documents. (See par. 35 of his petition.) As to the conclusion which might have been drawn by the jury from these documents, the tourist card would merely have been cumulative of the departure of the Sobell family for Mexico. As Sobell stated in his brief on appeal: "The prosecution showed, by evidence which in itself tended to become cumulative, that the appellant Sobell had left the United States, with his family, for a trip to Mexico in the summer of 1950" (p. 56).

43. As to the vaccination certificate, that would seem to be at least as consistent with an intention to travel to some other part of the world as to a desire on Sobell's part to return to the United States.

44. At any rate, such inferences were for the jury to draw upon the evidence presented to them. Sobell's failure to introduce evidence which he belatedly considers would have been helpful to him is no reason whatsoever for a new trial.

SOBELL HAS HAD MORE THAN AMPLE OPPORTUNITY TO RAISE HIS PRESENT CONTENTIONS IN THE PAST; AND HIS CONTENTIONS HAVE BEEN PREVIOUSLY PRESENTED AND REJECTED

45. On August 3, 1950 a warrant for Sobell's arrest was issued by a United States Commissioner for this Court. Pursuant to this warrant, Sobell was arrested at Laredo, Texas on August 18, 1950. In the light of these facts of record in this Court, the assertion in Sobell's petition (Par. 35 footnote) that he was arrested without a warrant can mean only that the arresting officer did not have the

warrant in his possession at the time of his arrest, which is of course entirely proper under Rule 4 of the Federal Rules of Criminal Procedure.

46. On February 5, 1951 Sobell applied to this Court for a writ of habeas corpus charging that his detention was unlawful. If he had been mistreated by the Mexican Security Police in the fashion which he now alleges, he must have been aware of those facts at the time he sought the writ of habeas corpus. Nevertheless he made no mention of such alleged mistreatment at that time, and based his petition solely upon alleged claim that the indictment was too vague and an argument that the statute violated the First Amendment. This petition was denied by Judge Leibell on February 5, 1951.

47. Sobell was not unaware of his opportunities for pre-trial discovery provided by the Federal Rules of Criminal Procedure. He made motion for inspection of Grand Jury minutes and for bills of particulars. Yet at that time he made no attempt to obtain the documents which he now contends the Government suppressed.

48. During the trial Sobell introduced no evidence in his own behalf. His counsel were not unaware of their opportunities to obtain evidence, as the following colloquy shows:

> "Mr. Collenburg: I am here on behalf of the Mexican Government. Last week a subpoena duces tecum which I have here was served upon the Consulate here to produce certain records in the Court. The Government asked me to appear specially to protest this service and to ask that the subpoena be vacated.

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> At the same time the Ambassador says that if a proper request is made for these documents through official channels he will be very happy to comply with such request.
>
> The Court: What is your name?
>
> Mr. Collenburg: Mr. Collenburg of Hardin, Hess & Eder.
>
> Mr. Kuntz: It becomes academic, your Honor. I am not going to even introduce it.
>
> The Court: You have no objection to my dismissing it?
>
> Mr. Kuntz: No.
>
> The Court: The subpoena is being withdrawn" (1770-71).

In particular his counsel knew where to obtain evidence that Sobell had used his own name on the flight from New York to Mexico City. His counsel stated on summation:

> "Tell me, is it hard to find out if you take a trip to Mexico? I can probably find out in two hours if you took a trip to Mexico. You need a visa—that is the Mexican Consulate.
>
> You go and buy an airplane ticket.
>
> How many air lines are there to Mexico? I can find out in two hours without Mr. Norton and without Mr. Harrington and without Mr. Branigan—I could find out by myself.
>
> I would send my clerk out and he will find out if you went to Mexico and if you sent in your own name" (2256).

In spite of the fact Sobell introduced no evidence, his counsel was permitted to assert in his summation to the jury that Sobell had used his own name in his flight to Mexico City (2256).

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49. Had he desired to introduce evidence to that effect, such as the American Airlines tickets and flight manifests attached as Exhibits 3 and 4 to his Petition, there was nothing to stop him. In fact, the date of conformation of Exhibits 3 and 4, March 27, 1951, shows that these exhibits were prepared by American Airlines during the course of the trial. Sobell now offers no explanation whatsoever as to his failure to introduce this evidence at that time.

50. Sobell admitted in his affidavit of September 23, 1953 filed in the Court of Appeals for this Circuit with respect to these tickets that he had cashed in the return trip tickets for himself and his wife and had only retained the ticket for his daughter. Whether this failure to introduce evidence with regard to these tickets was motivated by a fear of the conclusions that would be drawn by the jury if the facts were known, or by some other unexplained reason, the choice not to bring this evidence before the jury was that of himself or his counsel, and he must now abide the jury's decision.

51. The jury rejected arguments by Sobell's counsel which are essentially the same as those now advanced again in somewhat more elaborate form. Counsel told the jury Sobell went to Mexico under his own name:

> "Well, let's see about that Mexican trip. I say that Sobell and his family went down to Mexico by airplane in his own name—how do you like that? I dare him deny that. I dare Saypol to deny that. And I am telling you that if they didn't know before they spoke to Danziger that Sobell went down to Mexico by air—if you remember the testimony of Bill Danziger, he told Saypol that the day that they left, that the Sobells left, he visited there to pick

> up some drill, and that they told him that they were going to Mexico by air line, so that at least—at least from the time that Saypol or his men spoke to Danziger, they knew that" (2255-56).

Counsel attempted to explain Sobell's use of aliases in Mexico on his travels to Tampico and Vera Cruz as "a brainstorm" (2257). He said to the jury, "It is none of our business" (2259).

52. Sobell's counsel also argued to the jury that Huggin's testimony did not establish that Sobell was deported from Mexico:

> "* * * look at that notation at the bottom in Huggin's handwriting, 'Deported from Mexico'. Now wait a second, just a second. Mexico you know is a civilized country. Mexico has a government; it has courts; it has Immigration officials; it has the same kind of people and the same kind of institutions we have. Do we deport anybody or prove deportation by having Mr. Saypol get on the stand and say 'From my observation he was deported from Mexico'?" (2260-61).

The jury was not persuaded by the summation of Sobell's counsel and by their verdict rejected the very arguments which Sobell now raises.

53. Sobell then moved in arrest of judgment on substantially the same grounds which are now asserted here as the basis for a new trial (2403-25). Counsel admitted to the Court that he was aware of these alleged facts during the trial itself, and that he had not chosen to introduce evidence to support them (2407, 2420). The assertion that the notation "Deported from Mexico" was a falsehood

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and that the prosecution must have known it to be false was made at that time (2403-04). So was the assertion that Sobell's departure from the United States was not under circumstances of secrecy and that he had bought a ticket in his own name (2420). (It may be noted that the Government's proof that Sobell had used fictitious names while in Mexico in his travels to the port cities was in no way contradicted by the fact that Sobell preferred to use his own name on the flight to Mexico.) The Court commented:

> "You didn't even prove that he had left the United States under his own name. You could have called the Airlines official. You inferred that he had and I permitted you to argue that to the jury" (2420-21).

54. Judge Kaufman rejected these arguments of the defendant when they were made on the motion in arrest of judgment. On the appeal, Sobell's counsel briefed many arguments including the arguments that the notation "deported from Mexico" was prejudicial to him, that his forcible ejection from Mexico deprived him of the opportunity to return voluntarily, as well as the argument that the circumstances of Sobell's departure from Mexico amounted to kidnapping and a violation of international law such as to deprive the Court of jurisdiction.

55. The Court of Appeals rejected all of these contentions in an opinion which makes clear the inadequacy of Sobell's present petition:

> "When the Government introduced evidence to show that Sobell had been legally deported from Mexico (evidence clearly contradictory to Sobell's present assertion), he made no move to bring to light the facts of his alleged illegal abduction. He preferred

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> to take his chances on the verdict, withholding his trump card until the trial was over. The Federal Rules of Criminal Procedure allow no such tactics." 195 F. 2d at page 603 (2d Cir., 1952).

56. After the Court of Appeals affirmed his conviction, Sobell petitioned for rehearing, but did not rely upon the points now advocated. Sobell again raised the alleged improper introduction of the "deported" card and his alleged kidnapping in his petition to the Supreme Court for certiorari. After the denial of certiorari, 344 U. S. 838, and the denial of a rehearing, 344 U. S. 889, Sobell attacked his conviction by a motion under 28 U. S. C. § 2255. This petition alleged that the prosecuting authorities had knowingly used false testimony as well as a variety of other contentions. On this motion the petitioners asserted that the prosecution used the testimony of David Greenglass and Ben Schneider knowing it to be false. Judge Ryan rejected these contentions, stating:

> "I find no relevant or material issue of fact raised by the petitions which requires a hearing thereon or which renders the taking of oral testimony either necessary or helpful. I have concluded, after affording the attorneys for petitioners full opportunity to argue the legal problems presented by the petitions and to make proffers of proof, that the petitioners are entitled to no relief, that the court which rendered judgment had jurisdiction, that the sentences imposed were authorized by law and are not otherwise open to collateral attack on any of the grounds urged by the petitioners, and that full and complete enjoyment of the constitutional rights of petitioners has been extended them and has in no way been denied or infringed." 108 F. Supp. 798, 799-800.

(S. D. N. Y., 1952), affirmed 200 F. 2d 666, cert. denied 345 U. S. 965, rehearing denied 345 U. S. 1003.

57. The relief sought in Sobell's first petition under Section 2255 was substantially the same as the relief he now seeks. A portion of 28 U. S. C. § 2255 is quoted at page 2 of Sobell's present petition, omitting the following pertinent sentence:

> "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." 28 U. S. C. § 2255.

58. Sobell states in his present petition: "Petitioner has made prior application to the Court for relief pursuant to Title 28 U. S. C., Sec. 2255, but not on the grounds or facts set forth herein." *Sobell does not explain his failure to assert the present grounds in his prior petition.* Furthermore, under § 2255, the fact that similar relief was sought in the prior petition means that this Court is not required to entertain this motion.

59. This defendant has been tried by a fair and impartial jury under the most perfect procedures for obtaining justice yet developed in the history of mankind. He has had every opportunity to challenge the evidence presented against him. All twelve jurors were convinced beyond a reasonable doubt of his guilt. He has been fairly convicted of participation in the conspiracy to furnish the Soviet Union with our military secrets. "His activities in furtherance of this conspiracy continued well into the cold war period, long after it was apparent that Russia was hostile to the United States." 109 F. Supp. at p. 382 (S. D. N. Y., 1953).

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60. The baseless charges of perjury and suppression of evidence which he now asserts are elaborations of arguments essentially on matters which he claims to have known prior to the trial and which have been advanced and judicially rejected time and time again.

61. His petition taken together with the previous record in this case shows conclusively that he is entitled to no relief. His attempt to impugn the integrity of the judicial processes by which he was convicted should be rejected.

PAUL W. WILLIAMS,
United States Attorney for the Southern District of New York.

Sworn to before me this
21 day of May 1956.

DANIEL TANENBAUM
Notary Public, State of New York
Qualified in Kings County
No. 24-3930200
Commission Expires March 30, 1957

Reply Affidavit of Morton Sobell, Read in Support of Motion of May 8, 1956

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF CALIFORNIA)
COUNTY OF SAN FRANCISCO) ss.:

MORTON SOBELL, being duly sworn, deposes and says: He is the petitioner in the proceedings herein and submits this affidavit in reply to the answering affidavit of Paul W. Williams.

The government's affidavit merely reinforces the petitioner's right to a hearing. There are no grounds set forth which can serve as grounds for the denial of the relief sought in the present petition. Moreover, as will be set forth below in more detail, the government's answer raises issues of fact which must be resolved in the course of the hearing. The petition charges that Messrs. Cohn and Saypol knowingly used perjured testimony and suppressed evidence impeaching the prosecution's case. It further charges that Mr. Saypol knowingly made false representations to the Court. No affidavit denying these allegations by either of the aforesaid persons has been submitted.

The petition specifies by name the employees of the Department of Justice involved in the unlawful seizure and the circumstances of the abduction. The petition charges that Huggins presented false and perjurious evidence, that Huggins and Saypol had been advised by the Government of Mexico long prior to the trial that petitioner was not deported, and that Huggins and the prosecution suppressed this vital impeaching evidence. Neither the agents of the

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F.B.I., Huggins, nor the prosecutors have submitted affidavits controverting these facts.

The allegations set forth in the petition are true. Nevertheless the government does raise issues of fact as to the matter of deportation and the petitioner's tourist card which are not supported by the files and records of the case and which make a hearing necessary.

For the convenience of the Court the petitioner will deal seriatim with the matters raised in the answering affidavit.

THE CLAIM THAT THERE WAS OTHER TESTIMONY ADDUCED AT THE TRIAL, NOT PRESENTLY ATTACKED, IS IRRELEVANT TO THE ISSUE POSED IN THE INSTANT MOTION

The petitioner charges that the prosecution knowingly used perjured and false evidence to obtain his conviction. The false evidence was admittedly material and relevant. That the present motion does not direct itself to other testimony adduced at the trial is irrelevant. Petitioner does not at all concede the truthfulness of the rest of the government's case. He seeks to set aside an illegal sentence and will prove his innocence in the course of a new trial.

If the prosecution knowingly used perjured testimony, made false representations to the court or suppressed evidence impeaching its case, the petitioner must be released or in the alternative, be granted a new trial. The corruption of the judicial process flowing from the knowing use of perjured testimony taints and invalidates the whole proceeding and any sentence and judgment based thereon may not stand.

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GOVERNMENT CONCEDES THE FALSE EVIDENCE WAS MATERIAL AND RELEVANT AND WAS USED TO CONVICT PETITIONER

The government admits that the false and perjured evidence was highly relevant and was used to implicate petitioner in the charged conspiracy and as proof of "guilty flight." The government acknowledges it was used to establish that petitioner would not have returned to the United States voluntarily, and that his trip to Mexico was therefore evidence of flight from the prosecution. The major significance of this false testimony, recognized by the trial and appellate courts, need not be argued at length. The prosecution made use of the false claim and perjurious evidence, known to it to be false, throughout the trial. Its importance was reflected in the charge of the court to the jury, and in the briefs submitted to the United States Court of Appeals in reviewing the conviction.

---

1. *Opening statement by Mr. Saypol to the Jury:*

"* * * these defendants put into operation an elaborate and prearranged scheme to flee the country of their birth * * *. These efforts to flee the borders of our country and avoid facing you followed a carefully planned pattern. Fortunately, in most instances these attempts to escape were nipped in the bud, were thwarted (R. 183).

"You will hear how the defendant Sobell actually succeeded in getting out of the country, in a desperate and fortunately unsuccessful attempt to flee the country."

2. *The Court's charge:*

"To determine whether Morton Sobell was a member of the conspiracy you are only to consider the testimony of Max Elitcher, William Danziger and the testimony relating to the defendant Sobell's alleged attempt to flee the country" (R. 1560).

3. *Government's Brief to Court of Appeals* (pp. 17 and 27).

4. *See also Government's Brief in opposition to the petition for writ of certiorari.*

The deportation "was plainly relevant to show that Sobell's return to the United States was not voluntary and was thus probative to show flight" (p. 5).

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The petitioner in the course of the trial and on his appeal recognized the prejudicial nature of the false evidence. In any event petitioner cannot be required to serve an unjust and unlawful sentence based upon perjured testimony, knowingly used by the prosecution, merely because the significance of the false evidence is alleged to have been more fully recognized by the government than by petitioner or his counsel.

THE EVIDENCE THAT PETITIONER WAS DEPORTED FROM MEXICO WAS FALSE; IN ANY EVENT THE GOVERNMENT RAISES AN ISSUE OF FACT WHICH CAN ONLY BE RESOLVED BY A HEARING

The government concedes that the Court of Appeals held that the false evidence was introduced to establish that petitioner was legally deported by the Government of Mexico. (195 F. 2d, at p. 603; see also footnote 20, p. 603.)

No other inference could be drawn by the jury. The government does not contend otherwise. The prosecution sought to establish that petitioner was deported, lawfully, by the Government of Mexico, by its authorized agencies.

As set forth in the petition, the prosecution knew this evidence to be false. Huggins had been advised by an authorized representative that the evidence was false long prior to his testimony. He had so advised the agents of the F.B.I. and the prosecution.* At the time the prosecution consulted with Huggins in his preparation for his testimony they well knew that petitioner was not deported, and that the Government of Mexico was in no respect a party to the unlawful seizure.

* Mr. Saypol adverted to the close coordination between the prosecution and the Federal Bureau of Investigation in the handling of this case (R. 1582).

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The local Mexican police were not acting officially or pursuant to any directive of a Mexican governmental agency. They in fact had no power to arrest or deport petitioner or in fact remove him beyond the confines of the City of Mexico. Their action was not authorized by warrant nor did it have the color of law. These police were acting as agents of the United States prosecution and pursuant to its directions alone.

Mr. Williams now states, significantly not supported by an affidavit of Mr. Cohn or Mr. Saypol, that the prosecutor did not, through Huggins' testimony and Government Exhibit 25A, intend to establish or give the implication that petitioner was legally deported or removed by the Mexican government. Such a contention is not supported by the record, and if given any weight raises an issue of fact which must be resolved by a hearing.

Mr. Huggins was an immigration official fully acquainted with the term involved, its significance and meaning. Mr. Saypol was an experienced lawyer, and as a United States attorney had much experience in deportation matters; that field of law and its terminology was not foreign to him.

Further, the record of the trial reveals that the prosecution sought to establish and Huggins sought to import from the very beginning that petitioner was deported, by governmental action of Mexico.

Mr. Cohn asked government witness Rios when petitioner was "*deported to the United States by the authorities*" (R. 926). He stated that there was "*other proof coming of deportation*" (R. 926). Huggins advised the Court and jury that the Mexicans who delivered Sobell to Laredo were there in their official capacity (R. 1026). Further, he advised petitioner that he was deported from Mexico (R. 1036).

Mr. Saypol inferring that petitioner illegally entered Mexico, stated that he was "*literally kicked out as a de-*

portee" (R. 1599). The Court on the basis of this evidence charged the jury:

> "the prosecution says • • • that he [Sobell] was apprehended only after being delivered to the United States by the Mexican authorities" (R. 1559).

The prosecution was fully aware of the impact and meaning of the false evidence to the jury.

The prosecution in seeking to establish that the Government of Mexico deported petitioner, knowingly used the perjured testimony of Huggins and the false document in support thereof.

Assuming *arguendo* Mr. Williams' contention, nevertheless Messrs. Cohn and Saypol used the testimony to hide and suppress the unlawful acts of the prosecution in abducting petitioner and falsely represented to the jury that he would not voluntarily return. The prosecution knew it had deprived petitioner of his right to make the intended voluntary return but suppressed this fact.

The prosecution persisted in its contention that the Government of Mexico expelled petitioner and that his return to the United States was lawful but contrary to his will. In its brief to the Court of Appeals (Roy Cohn was of counsel on the brief), the following appears:

Page 34: "• • • Mexico had every right to expel Sobell without ceremony and that even if United States agents requested such expulsion (of which there is no proof) it would not render it unlawful."

Page 37: "The trial record in this case simply disclosed that Sobell was ejected from Mexico by the Mexican authorities (with no suggestion of mis-conduct on their part) and delivered to the United States Immigration Service."

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Page 38: "There is not a shred of evidence that any United States agent assisted the Mexicans in this act. Nor is there anything in the record to indicate that the United States government procured the Mexican government to deport Sobell * * * From this it may be inferred that the Mexican authorities had alerted the F.B.I. to expect Sobell's arrival, but it by no means follows that the Bureau was the instigator of Sobell's ouster.

"That Mexico had a perfect right to expel Sobell, an alien fugitive from justice, is settled beyond a dispute."

Page 39: "Since Mexico acted lawfully in effecting Sobell's expulsion, even if it were to make the unproved assumption that the United States requested Mexico to surrender Sobell it would not render Mexico's action any the less lawful."

In face of such statement by the prosecution in its brief to the Court of Appeals, the government's present contention cannot stand. It cannot be believed that Messrs. Cohn and Saypol intended to use the word deportation merely to describe a physical act. In any event, the goverment's affidavit raises an issue of fact which must be resolved by a hearing.

THE PROSECUTOR'S REPRESENTATIONS TO THE COURT WERE FALSE

The government in its answering affidavit does not contest the fact that Mr. Saypol represented to the Court that petitioner was removed from Mexico as a "deportee" but contends that the prosecutor's representation in the context of his statements * was true in that petitioner

* "This very affidavit contains a falsehood in the statement that there was exhibited amongst other things to the Mexican authorities visas. Counsel ought to know that his client never went into Mexico with a visa" (R. 1599).

did not have a visa but rather had a tourist card. Hence, it is argued, Mr. Saypol did not wish to infer to the Court that petitioner did not have a tourist card.**

Mr. Williams in his affidavit clearly, directly, and frankly concedes that petitioner had a tourist card, but maintains he did not have a "visa." Mr. Saypol, in dereliction of his duties, did not make such a frank disclosure.

Mr. Saypol by his representations sought to establish that petitioner had entered Mexico illegally thereby giving grounds for concluding that the Mexican Government had deported him.

As recognized by the government in its affidavit, a visa, like a tourist card, merely represents an expression of permission by one government for a citizen of another country to enter its borders. Mr. Saypol was well aware of the context in which the term "visa" was used in the affidavit in support of the motion for arrest of judgment. At worst the word "visa" was a misnomer; surely not a basis for challenging the veracity of petitioner's affidavit. The prosecutor was not concerned with exact terminology. He sought to prove that petitioner entered Mexico without that Government's consent.

The Charge of Suppression of Evidence

The government has not recognized the import and significance of the allegations of suppression set forth in the petition. It is not limited to the charge that the

** Once again the Government's interpretation of the operations of Mr. Saypol's mind, his subjective intent (not supported by his affidavit), is posed as an issue of fact which may only be resolved by a hearing.

prosecution suppressed documents unlawfully seized from petitioner. The petition charges *inter alia* that Huggins and the prosecution suppressed the facts known to them that they had been advised by the Government of Mexico that petitioner was not deported and was seized contrary to the laws of Mexico and without the sanction of that government. It is charged that the prosecution suppressed the fact that it instigated, planned and participated in the unlawful seizure so as to deprive petitioner of the opportunity of voluntarily returning to the United States and sought to establish that he was returned against his will as proof of guilty flight. This suppression is evidenced further by misrepresentations to the trial court and to the Court of Appeals. (See government's brief to the Court of Appeals.)

The prosecution, after seizing the petitioner's papers, suppressed them. The prosecution did not reveal to the petitioner, or to the Court or jury, that it had evidence impeaching the prosecution's case in spite of its obligation and duty to do so. These unlawful actions of the prosecution constituted a denial of due process and vitiated the trial proceedings and the sentence based thereon. A criminal trial involving a capital offense cannot be conducted as a game of chance.

THE PETITIONER COULD NOT HAVE RAISED HIS PRESENT CONTENTION AT AN EARLIER STAGE IN THE PROCEEDING

The issue posed in the present proceeding is whether or not the prosecution knowingly used false and perjured evidence to secure the conviction of petitioner. That the prosecution would do so could not have been known to the petitioner prior to the trial, nor could it have been litigated in the course of the trial. The government misconceives the point and appears to argue as if the present

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motion were premised upon the theory of newly discovered evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure. This is not in accord with the facts.

The petitioner, both during the trial and for some time thereafter, was unaware of the fact that the prosecution had knowingly used perjured testimony, or that it was the prosecution who had caused his abduction and removal without the consent or knowledge of the Government of Mexico. He had no proof to support such contentions. It has taken petitioner and those acting in his behalf many years to obtain the requisite proof which served as the foundation for the present petition, some of the evidence having been obtained only within the past few months. Had petitioner proceeded prior to obtaining the evidence, his application would have been dismissed as groundless; surely he cannot be punished and caused to suffer unjust imprisonment because he has awaited the necessary accumulation of data prior to proceeding in court.

Petitioner's defense was severely prejudiced by the false evidence and the wrongful actions of the prosecution. Surely it was a vital factor which prevented petitioner from taking the stand. He would have had to state in effect that an official of the Department of Justice, Huggins, gave false testimony; that the certification of the documents should be disregarded and the prosecutor's representations were unfounded. Surely the jurors may have conjectured that the Government of the United States or its employees would not testify falsely and in disregarding petitioner's testimony in this respect they would discount the testimony disproving the claims of Elitcher. Neither petitioner nor his wife should be obligated or required to overcome such burdens imposed by false testimony knowingly used by the prosecution. They should not be required to contest perjured testimony purportedly tendered with the sanction and prestige of the United States Government.

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THE PETITIONER HAS NOT PREVIOUSLY LITIGATED THE ISSUES POSED IN THE PRESENT MOTION

Petitioner's motion in arrest of judgment was not based on the grounds set forth herein and raised solely the question of the personal jurisdiction of the Court over him.

The affidavit in support of the motion in arrest of judgment (R. 31-33) did not allege directly or inferentially that the prosecution knowingly used perjured testimony. It did not in fact allege that he was not deported from Mexico, nor did it charge the prosecution caused or instigated his seizure. Faced with the representation of government employees and his own lack of knowledge of Mexican procedure and circumstances leading to his removal, he could do no more. He merely stated that upon his affidavit the Court was not vested with *personal* jurisdiction.

The issue of knowing use of perjured testimony was not presented to the Court. Petitioner had no proof and tendered none in support of such a proposition. Counsel for petitioner in stating the essence of the motion (R. 1596) declared that a hearing should be held to determine whether or not the United States instigated the removal of petitioner, thereby depriving the Court of personal jurisdiction. The object of his motion was to obtain a hearing and thereby acquire information relative to his seizure.

The prosecution recognized the limited nature of the motion and therefore argued the Court could not grant the relief in that matters of personal jurisdiction could not be raised subsequent to trial.

The Court of Appeals in sustaining the denial of the motion held that it related only to a matter of personal jurisdiction and therefore had been waived after a trial on the merits (195 F. 2d 602). Had the issue been one of knowing use of perjured testimony, surely it could not have been contended that it had been waived at that time.

Reply Affidavit of Morton Sobel, Read in Support of Motion of May 8, 1956

The briefs of petitioner and the prosecution to the Court of Appeals and on the petition for writ of certiorari to the United States Supreme Court reveal that the sole matter at issue was that of personal jurisdiction and in no way related to a claim of knowing use of perjured testimony.*

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* *Petitioner's Brief to Court of Appeals*:

Page 62: "By motion in arrest of judgment * * * appellant contested the jurisdiction of the United States and hence of the court over the person of Morton Sobell."

Page 65: "Whether the acts that led to Sobell's abduction were an international trespass by the United States, or merely in violation of domestic law by its officials (the facts are equivocal and which of the alternatives apply could only be learned on a hearing) the appropriate consequence is that the United States now has no jurisdiction of his person."

Prosecution's Brief to the Court of Appeals:

Page 17: "After the verdict was returned, Sobell for the first time challenged the trial court's jurisdiction of his person by moving in arrest of judgment."

Page 34: "* * * Sobell forfeited any right to question the court's jurisdiction of his person by going to trial on the merits without objection." See also page 35.

Petitioner's Reply Brief:

Page 9: "We simply reassert that a hearing is required as to whether the assault, detention and transportation of Sobell were acts done or participated in by officers of the United States."

Government Brief in Opposition to Petition for Writ of Certiorari:

Page 41: "Petitioner Sobell contends that his motion in arrest of judgment challenging the trial court jurisdiction over his person should have been sustained."

Reply Affidavit of Morton Sobel, Read in Support of Motion of May 8, 1956

In any event the prosecution's false representations to the Court in the course of the argument of the motion in arrest of judgment made that proceeding a nullity.

The Government alludes to a prior 2255 motion made by co-defendants Julius and Ethel Rosenberg. This motion subsequently joined in by petitioner related solely to testimony of David Greenglass and Ben Schneider, government witnesses whose testimony in no way related to petitioner. The facts and grounds there presented to the Court were in no way related to the present application.

Upon the petition, the government's affidavit in opposition and the files of this case, a hearing should be held and the relief sought be granted.

Petitioner's presence at the hearing is essential. There are substantial issues of fact as to events in which the petitioner participated. Petitioner should be transferred forthwith to this district so that he may be afforded an opportunity to consult with his counsel in preparation for the hearing.

MORTON SOBELL.

Sworn to before me this
day of May, 1956.

Notice of Motion of May 25, 1956

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Sirs:

PLEASE TAKE NOTICE that upon the petition of Morton Sobell, and the appendices and exhibits attached thereto, and on the files and records of this case, the undersigned will move this Court at a Criminal Part to be held thereof, on May 31, 1956, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for

(1) an order granting a hearing to determine the issues and make findings of fact and conclusions of law with respect thereto, and upon such findings of fact and conclusions of law, for an order vacating and setting aside the sentence and judgment of conviction and discharging the petitioner forthwith from detention and imprisonment.

(2) an order that petitioner be present at the hearing aforesaid; and

for such other and further relief as to the Court may be just and proper in the premises.

Dated: New York, N. Y., May 25, 1956.

Yours, etc.,

DONNER, KINOY & PERLIN,
By MARSHALL PERLIN,
342 Madison Avenue,
New York 17, N. Y.,

BENJAMIN DREYFUS,
57 Post Street,
San Francisco 4, California,
Attorneys for Defendant.

Petition, Read in Support of Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

To the Honorable Judges of Said Court:

The petition of Morton Sobell respectfully represents:

1. The petitioner is unlawfully, unjustly and illegally detained and imprisoned by Paul J. Madigan, Warden of Alcatraz Penitentiary, a federal penal institution, acting as the agent and under the direction of the Attorney General of the United States and his authorized representatives, to whose custody he was commended, under and by virtue of a judgment entered and commitment issued by the United States District Court for the Southern District of New York dated and filed April 5, 1951.

2. The indictment against petitioner, returned on January 31, 1951, charged in a single count that he had conspired with others to transmit to the Union of Soviet Socialist Republics "documents, writings, sketches, notes and information relating to the national defense of the United States" in violation of Section 34 of Title 50 of the United States Code.

3. Petitioner was tried, together with co-defendants Julius and Ethel Rosenberg, before judge and jury from March 6 to 29, 1951, when the jury returned a verdict of guilty against the petitioner.

4. On April 5, 1951, petitioner was sentenced and committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of thirty years.

Petition, Read in Support of Motion

5. On November 26, 1952, after petitioner had been incarcerated in the Federal House of Detention and Atlanta Penitentiary, the Attorney General, through his authorized representative, caused and ordered the transfer of petitioner to Alcatraz Penitentiary, where the petitioner has remained and is now detained.

6. Petitioner duly appealed to the United States Court of Appeals for the Second Circuit from the aforesaid judgment of conviction. On February 25, 1952, that Court affirmed the judgment of conviction, Judge Frank dissenting. The Court's opinion is reported at 195 F. 2d 583. On April 8, 1952, the Court denied a petition for rehearing, 195 F. 2d 609-611.

7. Petitioner duly petitioned the Supreme Court of the United States for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit. On October 13, 1952, the United States Supreme Court entered an order denying said petition, 344 U. S. 838. On November 17, 1952, the United States Supreme Court entered an order denying petitioner's petition for rehearing, 344 U. S. 889.

8. Petitioner makes this application praying that his sentence be vacated and set aside and that he be discharged from detention and imprisonment forthwith pursuant to provisions of Section 2255 of Title 28 of the United States Code. The criminal proceedings against him and his conviction were unlawfully, illegally and unjustly instituted and procured in violation of the Constitution and laws of the United States, including *inter alia* the extradition treaty between the United States and Mexico.*

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* The Treaty on Extradition signed on February 22, 1899, at Mexico City, 31 Stat. 1818. This treaty was supplemented in 1902, 1925 and 1939. See also Convention between United States of America and other American Republics, signed at Montevideo, December 26, 1933, United States Treaty Series No. 882.

Petition, Read in Support of Motion

The United States itself, as well as its courts, thereby lacked all sovereignty and power to conduct the proceedings herein and this Court was without jurisdiction to impose the sentence. The proceedings were void *ab initio*. The judgment and sentence are subject to collateral attack.*

9. The sovereign power of the United States and the power of its constituted executive and judicial branches to maintain and conduct criminal proceedings involving persons located within the territory of Mexico are limited, restricted and controlled by the extradition treaty between the United States and Mexico. The proceeding must be pursuant to the grounds and official arrangements set forth in the aforesaid treaties; absent this, the jurisdictional

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* Title 28, United States Code, Section 2255:

Federal custody: remedies on motion attacking sentence.

A prisoner in custody under sentence of a court of the United States claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or re-sentence him or grant a new trial or correct the sentence as may appear appropriate.

power of the United States and its governmental branches in the criminal proceeding is null and void and devoid of any legal basis.

Petitioner was not extradited from Mexico, nor was jurisdiction granted to the United States by the Government of Mexico. The United States was precluded from trying petitioner in that the offense charged was excluded by the extradition treaty, and the conditions and requirements of the aforesaid treaty were not complied with.

Agents of the United States, in violation of the Constitution, laws and treaties of the United States and in transgression of the national and territorial sovereignty of the Government of Mexico, arranged, planned, instigated and participated in the unlawful seizure, abduction and kidnapping of petitioner from Mexico to the United States, causing and sustaining the conviction of petitioner. The judgment and sentence were therefore null and void. Also, contrary to due process of law, these actions served to establish a substantial evidentiary basis for the conviction of petitioner.

10. - "The objection is that the government, itself, lacked power to seize, since by the treaty it had imposed a territorial limitation upon its own authority * * * our government, lacking power to seize, lacked power because of the treaty to subject the * * *" petitioner "to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the treaty * * *. Here the objection is * * * fundamental. It is the jurisdiction of the United States. The objection is not * * * lost by the entry of an answer to the merits. The ordinary instances of possession of" petitioner "yield to the international agreement." (*Cooke* v. *United States*, 233 U. S. 102, 121-122)

This motion, directed to the jurisdiction of the Court over the subject matter, may be raised at any time.

11. No previous application for relief on the grounds set forth herein has been made.*

FACTS ESTABLISHING THE LACK OF SOVEREIGN AND JUDICIAL POWER TO CONVICT PETITIONER

12. The United States, through and by its agents, including the prosecution, agents of the F. B. I. and of the United States Embassy in Mexico City, unlawfully and willfully planned, initiated, and participated in the illegal seizure of petitioner in Mexico and his abduction and removal to the United States, and caused his conviction and sentence through proceedings in violation of the extradition treaty between the Government of the United States and the Government of Mexico, thereby depriving this Court and nation of jurisdiction over the subject matter.

13. Petitioner repeats and re-alleges with the same force and effect as if fully set forth herein, paragraphs 28th, 29th, 31st, 32nd, 33rd, 34th, 35th, 36th, 54th, 55th, 62nd, 63rd, 64th, 65th, and 66th of his petition pursuant to Section 2255 filed on the 8th day of May, 1956.

14. The local police of Mexico City who seized and abducted petitioner were acting unlawfully and without the knowledge or consent of the Government of Mexico or any of its authorized agents. The aforesaid police were acting with and solely pursuant to the direction and control of the United States through its agents, the Department of Justice and the United States Embassy at Mexico.

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* Petitioner has made prior application to the Court for relief pursuant to Title 28, U. S. C. Section 2255, but not on the grounds set forth herein. Subsequent to the verdict in the trial of petitioner and prior to sentencing, a motion in arrest of judgment was made challenging the *personal* jurisdiction of the Court. The present motion does not deal with or direct itself toward the matter of personal jurisdiction.

15. The United States Embassy in Mexico City served not only as a place of interrogation and as a coordination center, but took custody of some of the property and documents seized from petitioner's apartment in Mexico City. Subsequent to the unlawful abduction, agents of the United States continued their unlawful activity in violation of the extradition treaty and the national and territorial sovereignty of Mexico by conducting unlawful investigations, seeking to obtain the conviction of the petitioner.

16. Petitioner repeats and re-alleges with the same force and effect as if fully set forth herein Paragraphs 56th, 57th, 58th, 59th, 74th and 81st of the petition pursuant to Section 2255 of Title 28 U. S. C. filed in this Court on the 8th day of May, 1956.

17. Petitioner was not deported or expelled by the Government of Mexico, nor was his removal in any way consented to by that government (See Paragraphs 37th through 55th of the petition of May 8, 1956). Agents of the United States, including *inter alia* representatives of the Department of Justice, were advised of this fact (See Paragraphs 47th through 52nd of the petition of May 8, 1956).

THE TREATY VIOLATION DEPRIVED THE COURT OF JURISDICTION

18. The United States and Mexico are bound by a treaty on extradition which specifies the grounds of extradition and the arrangements to be followed by the signatories. The power and jurisdiction of the United States and its subsidiary agencies and branches is governed and limited by the aforesaid treaty.

19. Under the aforesaid treaty, the United States is deprived of power to seize, to proceed criminally and to

convict a person located in the territory of Mexico, on the charge of espionage or the conspiracy to commit the same. The treaty directly limits the exercise of such jurisdiction to specifically enumerated offenses (Article II).

20. The treaty specifically excludes extradition for crimes of a political nature, or where political associations or activities are motivating or aggravating elements of the offense, or where such matters constitute any element of proof in establishing the offense (Article III, Paragraph 2 of the Extradition Treaty).* Yet the prosecution adduced evidence of petitioner's purported political associations and activities to prove the offense, and as an aggravating and motivating element thereof. Such political associations and activities further entered into the Court's consideration in imposing sentence upon petitioner.**

21. The treaty further requires a requisition through diplomatic channels. The requisition must be accompanied by an authenticated and attested copy of the warrant of arrest, and the complaint or indictment which may have been issued. It must transmit certified copies of the law defining the offense with which the person is charged and the penalty prescribed therefor.

22. Thereupon, apprehension of the alleged fugitive is accomplished by the proper executive authority of the

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* Treaty on extradition must be read in light of the Extradition Law of the United States of Mexico and the procedures there presented. See App. C of petition of May 8, 1956; see also Convention between the United States of America and other American Republics, signed at Montevideo, December 26, 1933, U. S. Treaty Series, No. 882, Article VIII.

** See testimony of Elizabeth Bentley (R. 964-1024); charge of the Court to the jury (R. 1558); comments upon sentencing (R. 1601-1603; 1612-1615), and upon application for reduction of sentence.

Government of Mexico and a hearing and examination is had before a proper judicial authority of Mexico to determine on the basis of law and evidence whether probable guilt has been established and whether or not the person is properly extraditable.* The court's judgment would be subject to examination by the President and subsequent review by another court.

23. Upon the facts set forth herein, as well as the allegations set forth in the petition of May 8, 1956, the Government of the United States violated the Treaty of Extradition, the Constitution and laws of the United States and the national and territorial sovereignty of the Government of Mexico, thereby depriving the Court of jurisdiction.

24. Authorities and representatives of the Government of Mexico made representations of objection to the unlawful abduction and seizure and the invasion of the sovereignty of that nation (See Paragraphs 40th, 41st, 48th, 79th and 80th of the petition of May 8, 1956).

25. By reason of the violation of the treaty, the prosecution was enabled to obtain the conviction of petitioner upon false evidence and the suppression of facts (see petition of May 8, 1956), all constituting a denial of due process of law.

WHEREFORE, petitioner asks that upon this petition the Court

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*The complaint against petitioner, issued August 3, 1950, specified five overt acts, none of which was proved in the trial. Petitioner was not indicted until October 17, 1950, two months after seizure. Much of the evidence, including that relating to purported flight, was not obtained until after his seizure and in fact constituted the tainted fruit of the Government's unlawful action.

Petition, Read in Support of Motion

(1) Grant a hearing to determine the issues and make findings of fact and conclusions of law with respect thereto; and upon such findings of fact and conclusions of law vacate and set aside the sentence and judgment of conviction and discharge petitioner forthwith from detention and imprisonment;

(2) Order that petitioner be present at the hearing aforesaid; and for such other and further relief as to the Court may seem just and proper in the premises.

Dated, May 25, 1956.

MORTON SOBELL,
By His Attorneys,

DONNER, KUNOV & PERLIN,
342 Madison Avenue,
New York, New York,

BENJAMIN DREYFUS,
57 Post Street,
San Francisco, California.

Affidavit of Paul W. Williams, Read in Opposition to Motion of May 25, 1956

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

PAUL W. WILLIAMS, being duly sworn, deposes and says:

1. I am the United States Attorney for the Southern District of New York and appear for the United States of America in opposition to this fourth motion of Morton Sobell seeking a hearing and an order setting aside his conviction under 28 U. S. C. § 2255. The facts contained in this affidavit are stated upon information and belief based upon the files and records in this case.

2. The moving papers of the defendant, Morton Sobell, and the files and records of this case conclusively show that he is entitled to no relief.

3. The alleged grounds for Sobell's fourth § 2255 motion are that the United States of America and this Court had no jurisdiction by reason of Sobell's allegation that he was "kidnapped" and forcibly ejected from Mexico with the cooperation of the FBI and other agents of the United States. Sobell has advanced this contention previously in his motion in arrest of judgment, in the appeal of his conviction (See Exhibit A which is an extract from his Brief on appeal), and in his petition to the Supreme Court for

certiorari (See Exhibit B). In each instance, the argument has been judicially rejected (2403-25; 195 F. 2d at p. 603; 344 U. S. 838). Sobell attempts to distinguish his present argument on the ground that his earlier arguments raised only the question of the jurisdiction of the Court over his *person*, whereas he now seeks by realleging a similar story to raise the question of the Court's jurisdiction over the *subject matter*.

4. The contention that this Court lacked jurisdiction over the *subject matter* is absurd. The subject matter in a criminal case is the crime charged. The indictment charged that Sobell and others conspired with intent and reason to believe that it would be used to the advantage of the Union of Soviet Socialist Republics, to deliver documents, writings, sketches, notes and information relating to the military defense of the United States of America. The indictment charged that this conspiracy took place at the Southern District of New York and elsewhere in violation of § 34 of Title 50 of the United States Code. The United States Code expressly grants jurisdiction over this offense to the District Court:

> "The district courts of the United States shall have original jurisdiction * * * of all offenses against the laws of the United States." Title 18 U. S. C. § 3231.

How Sobell was deported from Mexico has nothing to do with this Court's power to try offenses against the United States, nor with the power of the United States to make espionage conspiracy a crime. All it can pertain to is whether Sobell was properly before the Court—by definition a problem of jurisdiction over the person. *Ford* v.

United States, 273 U. S. 593, 606 (1927); *Pon* v. *United States*, 168 F. 2d 373 (1st Cir. 1948).

5. The Court of Appeals expressly decided in *United States* v. *Rosenberg*, 195 F. 2d 583 (1952), that Sobell's allegations of "kidnapping" did not raise any question as to this Court's jurisdiction over the subject matter. After discussing these allegations, which had been made by Sobell for the first time after the trial had been concluded and the jury had rendered its verdict of guilty, the Court stated:

> "Under Rule 34, motions in arrest of judgment are allowed only (1) where the indictment charges no offense and (2) where the court had no jurisdiction over the offense charged. This situation, we think falls into neither category." 195 F. 2d at p. 603.

6. The Court of Appeals held that Sobell's challenge went only to jurisdiction over his person and was therefore untimely since he failed to advance his contentions until the trial was over.

> "He preferred to take his chances on the verdict, withholding his trump card until the trial was over. The Federal Rules of Criminal Procedure allow no such tactic." 195 F. 2d at p. 603.

7. In his petition to the Supreme Court for a writ of certiorari, Sobell again used the "kidnapping" argument. In this petition, however, he did not specify whether he was labeling the argument an attack on jurisdiction over his person or over the subject matter, perhaps to avoid the decision of the Court of Appeals that he had waived

any challenge to jurisdiction over his person by holding back information. The Supreme Court denied the petition for a writ of certiorari. 344 U. S. 838.

8. The decision that this Court had jurisdiction over the subject matter has been implicit in each of the many decisions by this Court and the appellate courts which have passed upon this case on numerous occasions. Sobell's allegations that he was illegally "kidnapped" from Mexico with the cooperation of United States officials had been advanced to these courts. It is a fundamental principle that a court must always pass upon its own jurisdiction, whether counsel argue the matter or not. *Defiance Water Co.* v. *Defiance,* 191 U. S. 184, 194 (1903); *United States* v. *Bradford,* 194 F. 2d 197, 200 (2d Cir. 1952), cert. denied 343 U. S. 979.

9. As he did in his brief on appeal and in his petition for certiorari, Sobell cites *Cook* v. *United States,* 288 U. S. 102 (1933), which is not in point. That case involved the jurisdiction of the United States over a British vessel for an offense alleged to have occurred at a place which was outside the territorial waters of the United States as established by treaty. On the other hand, Sobell is an American citizen who has been convicted of a crime committed on American soil in the Southern District of New York. The *Cook* case is no authority for the proposition that the United States of America and this Court lack jurisdiction over such an offense.

10. For seventy years, it has been the settled law of this country that a United States citizen charged with a crime committed in this country and apprehended on foreign soil is given no immunity by the Constitution, laws or extradition treaties of the United States to avoid trial upon

his forced return to this country, even though the machinery of extradition was not employed to accomplish his return. *Ker* v. *Illinois*, 119 U. S. 436 (1886). The *Ker* case itself concerned a defendant who was forcibly taken from Peru by an agent of the United States Federal Government without following the extradition treaty. In that case however, the time elapsing between Ker's initial apprehension in Peru and his arraignment in the United States was many weeks. In the instant case, Sobell says he was first apprehended by Mexican police at about 8 P. M. on August 16, 1950. A warrant for his arrest had been outstanding since August 3, 1950. He was driven to Texas and at 10 AM on August 18, 1950, less than two days after his apprehension, was brought before a United States Commissioner in Texas for fixing bail on the charges pending against him. Sobell makes no claim that any attempt was made to obtain a confession from him during the time between his apprehension in Mexico City and his return to this country. The contention that the manner of his deportation from Mexico amounted to a violation of the extradition treaty has no more merit now than the contention of Ker which the Supreme Court rejected in 1886:

> "There is no language in this treaty, or in any other treaty made by this country on the subject of extradition, of which we are aware, which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled; indeed, the absurdity of such a proposition would at once prevent the making of a treaty of that kind." 119 U. S. at p. 449.

11. Recently the Supreme Court has rendered a decision which makes even more clear that Sobell raises no

issue of any fundamental nature which would deprive this Court of jurisdiction or in any way vitiate his trial. In *Frisbie* v. *Collins*, 342 U. S. 519, the Supreme Court denied habeas corpus to a prisoner in a Michigan penitentiary serving a life sentence for murder who alleged that the State of Michigan had no jurisdiction to try him because its agents had illegally seized him in Illinois, blackjacked him and forcibly transported him to Michigan in violation of the Constitution and the Federal Kidnapping Act. The Court held that the Federal Kidnapping Act did not change the rule declared in its prior decision in *Ker* v. *Illinois*, 119 U. S. 436. The breadth of the Court's language was not limited in its application to State Courts:

> "This Court has never departed from the rule announced in *Ker* v. *Illinois*, 119 U. S. 436, 444, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.' No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will." 342 U. S. at p. 522.

12. Morton Sobell was tried for this traitorous crime by a jury under the fairest procedures for obtaining justice yet developed by mankind. He was represented by counsel

of his choice. He had every opportunity to cross-examine the witnesses who testified against him. He had every opportunity to introduce evidence in his own behalf, which he did not choose to employ. Each and every one of twelve fair and impartial jurors pronounced him guilty beyond a reasonable doubt. He has challenged the validity of his conviction time and time again on every ground so far conceived by his various lawyers. See Appendix 1 which is a partial list of judicial proceedings upholding the convictions and sentences of Sobell and the Rosenbergs. Each such challenge has served only to re-enforce the verdict of his guilt and the fairness of the procedure by which that verdict was reached.

13. His latest petition taken together with the previous record from this case shows conclusively that he is entitled to no relief. The petition is so lacking in merit as to raise serious questions whether it is advanced in good faith. Sobell's attempt to deny the authority of the United States of America to try him for his betrayal of this country should be rejected.

PAUL W. WILLIAMS.

Sworn to before me this
day of June, 1956.

Appendix 1, Annexed to Affidavit of Paul W. Williams

PARTIAL LIST OF JUDICIAL PROCEEDINGS UPHOLDING THE CONVICTIONS AND SENTENCES OF SOBELL AND THE ROSENBERGS

March	29, 1951	After a trial of three weeks jury renders its verdict of guilty as charged as to the three defendants (2388-9).
April	25, 1951	Motion by Sobell in arrest of judgment denied by this Court (2403-25).
February	25, 1952	Convictions examined and affirmed by the Court of Appeals. 195 F. 2d 583 (2d Cir. 1952).
April	8, 1952	The Court of Appeals denied petition for rehearing. 195 F. 2d 583 (2d Cir. 1952).
October	13, 1952	The Supreme Court denied petitions for writs of certiorari. 344 U. S. 838.
November	17, 1952	The Supreme Court denied petition for rehearing. 344 U. S. 889.
December	10, 1952	This Court denied § 2255 motions to set aside the judgments. This was Sobell's first § 2255 motion. 108 F. Supp. 798 (Ryan, J.).
December	31, 1952	The Court of Appeals affirmed Judge Ryan's decision. 200 F. 2d 666 (2d Cir.).
January	2, 1953	The Court of Appeals denied Sobell's motion for leave to file a second petition for rehearing of the original appeal.

Appendix 1, Annexed to Affidavit of Paul W. Williams

January	9, 1953	This Court denied Sobell's application for reduction of sentence. 109 F. Supp. 881.
January	19, 1953	The Court of Appeals denied a petition for rehearing of its decision as to the first § 2255 motion.
May	25, 1953	The Supreme Court denied petitions for writs of certiorari to review the denial of the first § 2255 motion. 345 U. S. 965.
June	15, 1953	The Supreme Court denied petition for rehearing. 345 U. S. 1003.
June	9, 1953	This Court denied defendants' § 2255 motion and their motion for a new trial. This was Sobell's second § 2255 motion (I. R. Kaufman, J.).
June	11, 1953	The Court of Appeals affirmed the June 9, 1953 decision of this Court, appeal having been taken by the Rosenbergs. 204 F. 2d 633 (2d Cir.).
June	11, 1953	Sobell filed a notice of appeal of his second § 2255 motion.
June	15, 1953	The Supreme Court denied the Rosenbergs' application for a stay of execution pending application for a writ of certiorari to review the Court of Appeals decision of June 11, 1953 and two other decisions. 346 U. S. 271.
June	17, 1953	Mr. Justice Douglas granted a stay to the Rosenbergs. 273 U. S. 313.

Appendix 1, Annexed to Affidavit of Paul W. Williams

June	19, 1953	The Supreme Court vacated the stay stating in part that the Court "saw no substantial question in those [collateral] proceedings to be preserved for its further consideration." 346 U. S. 273, 281.
October	8, 1953	The Court of Appeals granted the Government's motion for summary affirmance of this Court's decision as to the second § 2255 motion with respect to Sobell.
October	31, 1953	The Court of Appeals denied Sobell's petition for rehearing of its October 8, 1953 decision.
February	1, 1954	The Supreme Court denied Sobell's petition for certiorari with respect to the denial of his second § 2255 motion. 347 U. S. 904.
June	7, 1954	The Supreme Court denied Sobell's second petition for rehearing of its denial of certiorari as to the original appeal. 347 U. S. 1021.

Exhibit "A"

EXTRACT FROM BRIEF FOR MORTON SOBELL IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT APPEALING THE JUDGMENT OF CONVICTION ENTERED APRIL 5, 1951

POINT V

THE UNITED STATES, AND HENCE THE COURT BELOW, HAD NO JURISDICTION OF THE PERSON OF SOBELL, SINCE HE WAS FORCIBLY SEIZED IN ANOTHER COUNTRY, BY OR AT THE INSTANCE OF THE F. B. I., AND THE COURT BELOW SHOULD HAVE DIRECTED A HEARING ON THIS ISSUE.

By motion in arrest of judgment, counsel for appellant contested the jurisdiction of the United States, and hence of the Court, over the person of Morton Sobell. The procedure is in accordance with *United States* v. *Rauscher*, 119 U. S. 407. The objection was timely, *Cook* v. *United States*, 288 U. S. 102, 122.

The facts disclosed by the affidavit in support of the motion, taken together with other facts of record showed: While Sobell was peacefully sojourning in Mexico City with his wife and two young children, he was taken forcibly by four men who said they were police, but made a false accusation of robbery; beaten until he lost consciousness; *prevented from communicating with the American Embassy;* and taken by his captors, after desultory stops, to the American border when an American agent entered the car (R. 2410-14). Other agents of the F. B. I. were present at the immigration station (R. 1525) and it is quite clear that their presence was part of a pre-arranged, single, transaction (R. 1531). An appropriate inference from the sequence of events is conveniently stated by Mr. Saypol (R. 2311), "The F. B. I. caught up with him and brought him back and you have him here."

As against this inadvertent disclosure, it is the formal position of the government that Sobell was "deported." Whether or not deportation, as an act of the State, need

be based on notice, charges, and an opportunity to be heard, it would seem minimal that it be initiated by an official order, emanating from an official with apparent authority to issue it. There is no reason of record, why Sobell should have been deported; no evidence of an order. That there was none may be inferred from the availability of such an order to the prosecution, if one existed, and failure to produce one.

There was enough to require a hearing, as to whether the assault, detention, and transportation of Sobell were acts done or participated in by officers of the United States.

The prosecutor's answer "as a matter of law" was that the Court will not be concerned with the circumstances under which a defendant is brought from a foreign place (R. 2425). The proposition stated is as untrue, as the *Dixon* case cited in support, is inapt. For that case (73 F. Supp. 683) held no more than that a seaman continued in constructive American custody, although a British Consul aided in transferring him from one American ship to another.

A court *is* concerned with how a defendant is brought from a foreign place, when he is brought in violation of treaty or international law, *United States* v. *Rauscher*, 119 U. S. 407; *Cook* v. *United States*, 288 U. S. 102. If the kidnapping and involuntary transportation of Sobell from Mexico City to the border was attributable to agents of the F. B. I., it was a violation of international law, and in contravention of our own law as well.

It matters not that the individuals initially participating in what was, after all, one continuous act were not themselves Special Agents. The government is bound, and if need be, disqualified by their conduct if they were acting in behalf of the F. B. I. *Byars* v. *United States*, 273 U. S. 28; cf. *Feldman* v. *United States*, 322 U. S. 487, 494. There are "adequate resources" against "evasive" use of the facilities of another sovereignty by a federal agency (id.). Entrapment will vitiate a prosecution when procured, as well as when performed by a federal officer, e.g., *Morei* v. *United States*, 127 F. (2d) 827.

Exhibit "A"

Agents of the Federal Bureau of Investigation are given meticulously circumscribed powers of arrest. *United States* v. *Coplon*, 185 F. (2d) 629, 634-5. Even if not territorially limited by court rule (Rule 4(c)(2) F. R. C. P.), their statutory authority to arrest, 18 U. S. C. 3052, would be confined to our territory by a rule of construction, required by international law, *American Banana Company* v. *United Fruit Company*, 213 U. S. 347, 357.

If what was done to Sobell in Mexico was done by agents of the F. B. I., or by any individuals acting for them, it would have been a violation of Mexican sovereignty, forbidden by international law. It would, moreover, have been kidnapping, in violation of Mexican law. *Villareal* v. *Hammond*, 74 F. (2d) 503; cf. *Collier* v. *Vaccaro*, 51 F. (2d) 17.

If what was done occurred by reason of agreement by individual Mexican officials, brought about by independent arrangements made by the F. B. I. agents, it would moreover have been in violation of our law. The agency entrusted by statute with correspondence with foreign nations, or "other matters respecting foreign affairs" is the State Department, 5 U. S. C. § 156. Any other person who communicates with a foreign government, officer or agent, with intent to influence its conduct in a matter that may be the subject of dispute or controversy with the United States, is guilty of a felony, 18 U. S. C. § 953. The procurement of the return of individuals, by negotiation independent of extradition treaties, has always been regarded as a source of possible dispute or controversy. It is a part of the delicate subject matter of "friendly international relationships." *Factor* v. *Laubenheimer*, 290 U. S. 276, 298. The Department of State in asking extradition, independent of treaty, or where not covered by existing treaty, deems it of great importance to avoid international misunderstanding by phrasing the request in an established formula, and the request is made only in "occasional instances", 4 Hackworth, Digest of International Law, 14-15. It was once the

rule that the request would never be made *Moore on Extradition*, § 43n.2, and so expressed in numerous State Department communications. As Secretary of State, Mr. Buchanan said: "It has been contrary to the practice of the United States even to request as a favor that the government of another country should deliver up a fugitive from criminal justice, because under our laws we possess no power to reciprocate such an act of grace." *Moore*, op. cit. § 34.

Whether the acts that led to Sobell's abduction were an international trespass by the United States, or merely in violation of domestic law by its officials (the facts are equivocal and which of the alternatives applies could only be learned on a hearing) the consequence appropriate is that the United States now has no jurisdiction of his person. If the former, there was absence of power *ab initio* that cannot be ratified by the service of process after Sobell's arrival. *Cook* v. *United States*, 288 U. S. 102.

If the acts be regarded as "only" a violation of law, rather than a seizure vitiated by absence of power, we contend that the result should be the same. The case of *Ker* v. *Illinois*, 119 U. S. 436 has sometimes been cited for more than it actually holds; the Court went no further there than to say that it would not interfere if the Supreme Court of Illinois chose to affirm a conviction of one kidnapped from a foreign country into the State. The question was one which "we do not feel called upon to decide" (at p. 444) and "we might or might not differ with the Illinois Court" (id.). Other Supreme Court decisions since the *Ker* case, have been concerned only with interstate rendition, *Mahon* v. *Justice*, 127 U. S. 700; *Pettibone* v. *Nichols*, 203 U. S. 192, as to which completely different considerations apply, *Lascelles* v. *Georgia*, 148 U. S. 537, 542.

The question of the appropriate response of a federal appellate court to facts such as are here shown to be probable, is an open one. We have found no decision by the Supreme Court or any Circuit Court of Appeals, passing on the effect of kidnapping of a defendant from a foreign

country by federal officers for purpose of trial on a federal charge.

McNabb v. *United States*, 318 U. S. 332, 340, points the way as to how such a state of facts should now be treated. "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." Considerations of self-limiting policy in reviewing *state action* (i.e. the *Ker* doctrine) are "wholly irrelevant to the formulation and application of proper standards for the enforcement of the federal criminal law in the federal courts" (340-1).

We may recall the dissent (the question involved was only one of interstate rendition) of Mr. Justice McKenna in *Pettibone* v. *Nichols*, 203 U. S. 192, 317-8, criticizing the views expressed in the *Ker* and *Mahon* cases:

> "These cases, extreme as they are, do not justify in my judgment, the conclusion deduced from them. In neither case was the State the actor in the wrongs that brought within its confines the accused person • • •. Kidnapping is a crime, pure and simple. It is difficult to accomplish, hazardous at every step. All of the officers of the law are supposed to be on guard against it • • •. But how is it when the law becomes the kidnapper, when the officers of the law, using its forms and exerting its powers, become abductors? • • •.
>
> • • • the right to resist removal is not a right of asylum • • •. It is a right to be free from molestation. It is the right of personal liberty in its most complete sense."

According to *McNabb* v. *United States*, supra "A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process" (at p. 343). Even the tolerance of *State* action permitted by the *Ker* case has been condemned

in no uncertain terms by Professor Dickinson, "Jurisdiction Following Seizure or Arrest in Violation of International Law" 28 Am. J. Int. Law 231 (1934). But whether or not a federal court will interfere with particular State action, the *McNabb* case imposes a responsibility here to require "civilized standards," in the supervision and control of the federal court's own officers.

Conclusion

The case against Morton Sobell did not warrant submission to the jury no matter how favorably Elitcher's testimony may be viewed from the Government's point of view. Conjecture and speculation may not masquerade as "inference". The procedures employed to convict him were indefensible. The vague and tricky indictment and the denial of particulars; the acceptance as evidence of the one-word ultimate conclusion; the use of the "deported" card and injection of testimony as to Communist Party membership, all conspired to deprive him of procedural safeguards, absence of which makes a verdict worthless. The errors of the court and his intervention, and the misconduct of the prosecutor, made the verdict inevitable. The manner in which Sobell was assaulted and dragged from Mexico is no less outrageous than the manner in which he was dragged into a trial of issues filled with emotional dynamite, with respect to which judge and prosecutor agreed he had not the least culpability. We respectfully urge that the judgment of conviction must be reversed and the indictment dismissed.

Respectfully submitted,

Harold M. Phillips,
Edward Kuntz,
Attorneys for Morton Sobell.

Harold M. Phillips,
Edward Kuntz,
Howard N. Meyer,
of Counsel.

Exhibit "B"

Extract From Sobell's Petition to the Supreme Court for a Writ of Certiorari

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VI. Kidnaping and the Motion in Arrest

This Court has, subsequent to the decision below, adhered, in *Frisbie* v. *Collins*, 342 U. S. 519 (March 10, 1952), to the doctrine of *Ker* v. *Illinois*, 119 U. S. 436. It did not have occasion, however, to pass upon the question left open by the *Ker* case, and which it has never decided, as to the effect of kidnaping from a foreign country by Federal officials, or at their instigation for the purpose of trial in a *federal* court.

It is particularly when, as claimed here, such kidnaping may have been in violation of international law, that questions are presented for a national tribunal which are not answered by *Frisbie*. Completely different considerations apply to international rendition, as distinguished from interstate rendition. *Lascelles* v. *Georgia*, 148 U. S. 537, 542-3. The dictum that a court will not be concerned with how a defendant is brought before it is hence belied by *United States* v. *Rauscher*, 119 U. S. 407 (trial after extradition on a different offense than that named in warrant) and *Cook* v. *United States*, 288 U. S. 102 (failure of jurisdiction when seizure is in violation of international law).

The facts claimed involve violations of the United States Code, because as the United States Attorney said, "The F. B. I. caught up with him and brought him back and you have him here" (R. 1534). Correspondence with foreign nations and "matters respecting foreign affairs" are entrusted to the State Department, 5 U. S. C., Sec. 156; others who communicate with a foreign government to influence

its conduct in a matter that may be the subject of dispute or controversy with this country are guilty of a felony, 18 U. S. C., Sec. 983. The procurement of the return of individuals, whether by right, under extradition treaties, or as a favor, independent of such treaties, is a part of the subject matter of "friendly international relationships." *Factor* v. *Laubenheimer*, 290 U. S. 276, 298.

The powers of arrest of agents of the F. B. I. are confined to our territory by a rule of construction, required by international law. If a hearing were to disclose either that they invaded Mexico as the literal meaning of the prosecutor's statement (R. 1534) would imply or that Mexican individuals (or officials) acted on their behalf in beating and kidnaping petitioner, there was a violation of Mexican territorial sovereignty by their conduct.

The result would be an absence of power, *ab initio*, and could not be ratified by service of process after petitioner's arrival here, *Cook* v. *United States*, *supra*.

Apart from the violation of Mexican sovereignty, there was lawless usurpation of the foreign affairs functions entrusted to the State Department, on the facts indicated in this record. The *Ker* case left open a question that should, in the light of *McNabb* v. *United States*, 318 U. S. 332, be answered differently in respect of the responsibility of this Court for administration of federal criminal justice, a responsibility for maintaining "civilized standards of procedure." Consideration of self-limiting policy in reviewing *state action* (*cf. Ker* and *Frisbie*) are "wholly irrelevant to the formulation and application of proper standards for the enforcement of the federal criminal law in the federal courts" (318 U. S. at pp. 340, 341).

The Court of Appeals declined to decide the point (R. 1668; 195 F. (2d) at pp. 602-3). Instead it held that it had been "waived" by the petitioner. Such a harsh result is not understandable in view of petitioner's reliance, in

the form of procedure employed—motion in arrest of judgment—on *United States* v. *Rauscher, supra*. And the Court did not attempt to reconcile its decision with this Court's holding in *Cook* that an objection of want of jurisdiction based on the violation of international law there involved was not "lost by entry of an answer to the merits" (288 U. S. at p. 122).

Conclusion

It is respectfully prayed that this petition for a writ of certiorari to review the judgment of the court below should be granted.

Howard N. Meyer,
205 West 34th Street,
New York 1, New York,
Counsel for Petitioner.

Harold M. Phillips,
Edward Kuntz,
New York, N. Y.,
of Counsel.

Reply Affidavit of Morton Sobell, Read in Support of Motion of May 25, 1956

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO } ss.:

MORTON SOBELL, being duly sworn, deposes and says: He is the petitioner in the proceedings herein and submits this affidavit in reply to the answering affidavit of Paul W. Williams.

1. The affidavit of Paul W. Williams in opposition to petitioner's motion under Title 28 U. S. C., Section 2255 merely reinforces the conclusion that the Court is required to grant a hearing under the governing law.

2. The affidavit fails to recite any facts in the moving papers, files and records of this case which conclusively show that petitioner is entitled to no relief. Instead the affidavit advances certain arguments based upon misconceptions of law and misstatements of the state of the record.

3. The affidavit in Paragraph 3 misstates petitioner's asserted grounds for relief. The Court is respectfully referred to the notice of motion, the petition, and the memorandum of law filed on June 4th, 1956. The petitioner has alleged that the trial court had no jurisdiction whatsoever over the subject-matter by virtue of the total and absolute breach and violation by the United States and its agents of the binding Treaty of Extradition of 1899 (31

Reply Affidavit of M. Sobell, Read in Support of Motion of May 52, 1956

Stat. at large 1818) between the United States and the United States of Mexico. Petitioner suggests that it is significant that the affidavit in opposition conspicuously attempts to avoid stating petitioner's contention openly and directly.

4. This contention as set forth in detail in the petition and the supporting memorandum of law, contrary to the inferences in the affidavit in opposition was never litigated in the prior proceedings. In neither the trial court, nor the Court of Appeals, nor the Supreme Court was the issue of want of total sovereign power and jurisdiction resulting from a breach of the Treaty either presented to the Court or litigated. A fair reading of the Record including Exhibits A and B to the Affidavit in opposition, requires this conclusion. Neither brief cited by Mr. Williams claims a treaty violation as the basis for loss of jurisdiction. It is significant that neither exhibit even *mentions* the Treaty of Extradition of 1899 between the United States and the United States of Mexico. To urge in the face of such a record that the issue of loss of total jurisdiction based upon violation of that Treaty was in any way litigated before is in the words of Mr. Williams "so lacking in merit as to raise serious questions whether it is advanced in good faith." (See affidavit in opposition, Paragraph 13.)

5. To the contrary, the record conclusively shows that the only jurisdictional issue litigated was sharply limited to a question of personal jurisdiction. (See Petitioner's Memorandum of Law, pp. 48 to 56.) Moreover, none of the operative facts showing a treaty violation were known to the petitioner, or were before the trial court or the Court of Appeals, including the presently charged facts that the

Reply Affidavit of M. Sobell, Read in Support of Motion of May 52, 1956

United States and its agents directly violated the Treaty by instigating, arranging and participating in the kidnapping of petitioner from the territory of Mexico; that the Government of Mexico or any of its authorities did not accede to or condone in any manner this violation of the governing treaty of extradition, but instead stated to United States authorities its objections to these actions; and that the offense charged was excluded from the competence of the Court by virtue of the extradition treaty.

6. The only other reasons advanced in the affidavit in opposition to the granting of a hearing is a reference to two decisions, *Ker* v. *Illinois*, 119 U. S. 436; and *Frisbie* v. *Collins*, 347 U. S. 519. Neither of these decisions have anything to do with this issue raised by this motion. (See Petitioner's Memorandum of Law.) *Ker* did not involve a treaty violation. Contrary to the statement in the affidavit in opposition, the defendant in *Ker* was not forcibly taken from Peru by "an agent of the United States Federal Government" (See affidavit in opposition, Paragraph 10), but by a private individual, a Pinkerton detective. The extradition treaty was not in force. Ker was delivered to the Pinkerton agent by the *de facto* governmental authorities, representatives of the occupying army of Chile. In short, there was no treaty violation, and the action was with the consent of the Government involved. *Frisbie* v. *Collins* does not apply in any respect. It relates to an *interstate* abduction and rendition situation, and as the Supreme Court has held "to apply the rule of international or foreign extradition as announced in *United States* v. *Rauscher* • • • to interstate rendition involves the confusion of two essentially different things which rest upon entirely different principles. In the former, the extradition depends upon treaty contract or stipulation. • • •

Reply Affidavit of M. Sobell, Read in Support of Motion of May 23, 1956

In the matter of interstate rendition, however, there is the binding force and obligation, not of contract, but of the supreme law of the land which imposes no conditions or limitations upon the jurisdiction and authority of the state to which the fugitive is returned." *Lascelles* v. *Georgia*, 148 U. S. 537.

7. The government makes no other argument in opposition to this motion. The record and the law conclusively reveal that these arguments opposing a hearing are completely without merit. The Court is required under the law and the statute to grant the hearing prayed for, and on the facts found and conclusions of law to vacate and set aside the sentence and judgment of conviction and discharge petitioner from detention and imprisonment.

MORTON SOBELL.

Sworn to before me the
day of June, 1956.

Minutes of Oral Argument

UNITED STATES DISTRICT COURT

Southern District of New York

C. 134-245

[Same Title]

[1] New York, June 4, 1956,
11:30 A. M.

Before:

Hon. Irving R. Kaufman,
District Judge.

Appearances:

Paul W. Williams, Esq., United States Attorney, and
Robert Kirtland, Esq., and
Maurice N. Nessen, Esq., Assistant United States Attorneys, for the Government.

Donner, Kinoy & Perlin, Esqs., Attorneys for Petitioner Morton Sobell;
Frank J. Donner, Esq.,
Arthur Kinoy, Esq.,
Marshall Perlin, Esq.,
Benjamin Dreyfus, Esq., and
Luis Sanchez Ponton, Esq., of Counsel.

Colloquy

[2] The Clerk: In the matter of Morton Sobell. Gentlemen, are you ready?

Mr. Perlin: Ready, your Honor.

Mr. Williams: The Government is ready.

The Court: All right, proceed.

Mr. Perlin: If it please the Court, at this time I should like to move the admission of Mr. Benjamin Dreyfus for the purposes of this case. Mr. Dreyfus is admitted to the highest court of the State of California and practices in the Federal Court in that circuit.

(Mr. Dreyfus stands.)

The Court: Very well.

Mr. Perlin: Your Honor, I should further like to note the appearance of Mr. Luis Sanches Ponton, an attorney from Mexico who has been retained in this case. He is an attorney, as I say, a former cabinet minister and held various posts. He is now professor of law at the University of Mexico in the field of International Law, and I would like to have his appearance noted.

The Court: Very well.

Mr. Perlin: Your Honor, this is a motion pursuant to Section—

The Court: Let us understand the order. You will make the motion addressed to the due process first. [3] You will argue and then Mr. Williams will argue.

Mr. Perlin: Correct.

The Court: And then we will take the other motion and hear that.

Mr. Perlin: Fine.

The Court: All right.

Mr. Perlin: Your Honor, this is a motion pursuant to Section 2255, setting forth three grounds for relief under that section of the law: No. 1, that the prosecution knowingly used perjured testimony.

No. 2, the prosecution made misrepresentations to the court,

And, No. 3, the prosecution suppressed facts favorable to the petitioner and which would have impeached its own case.

The petitioner in the present case was indicted in January of 1951 on a superseding indictment under Title 50 of Section 34. After a trial he was convicted and sentence was imposed on April 5, 1951.

The sentence of 30 years was imposed, and he is presently incarcerated in Alcatraz, in California.

Appeal was filed from the original conviction and was sustained—the conviction was sustained with one Judge dissenting, Judge Frank.

[4] The petition for certiorari was denied.

Subsequent to that time, there were two motions pursuant to Rule 33 of the Federal Rules of Criminal Procedure, and also of Section 2255, filed by his co-defendants, Julius and Ethel Rosenberg.

This was joined in by the petitioner, but they related to grounds not involved in the present proceeding.

I will not at this time deal, if your Honor please, with the question of prior litigation, and go on to that later, which the prosecution has raised in defense to this petition.

In the course of the trial there was one witness against Mr. Sobell. That one witness was Max Elitcher who sought to implicate him as a member of the conspiracy.

In addition to that, the prosecution introduced a number of witnesses on the theory that they wished to establish flight from prosecution, from the United States to Mexico, hence consciousness of guilty motive and intent, and further, as independent proof of his membership in the conspiracy.

Now the theory of that flight was that he had gone to Mexico to remain outside the United States permanently—

he was not to return—and that in seeking to avoid the authorities he had to be returned against his will by [5] deportation, by the government and the authorities of Mexico.

The essence of the whole flight testimony, we suggest to your Honor, lies primarily on the question of this forced return against his will which flowed out of the claim of deportation—deportation by the Government of Mexico.

The Court: Let me understand that. The essence of the flight testimony, you say, concerned itself primarily with whether he returned voluntarily or involuntarily to the United States?

Mr. Perlin: Your Honor, I say that was the most decisive part of the flight testimony, if I may put it that way, because you would have a totally different picture if a person voluntarily returned.

The Court: Right. So therefore you are saying that was the essence of that testimony.

Mr. Perlin: That was the essence of that testimony—he was returned against his will by the Government of Mexico pursuant to deportation.

Now this question of the flight and deportation, your Honor, was not limited just to one section of the case. Naturally it was a long, prolonged litigation, and it flowed throughout the trial. The issue was first raised, other than the opening statement of Mr. Saypol when [6] he alluded to the question of fleeing to Mexico and being apprehended there and brought back. It was raised by Mr. Cohn when he was examining government witness Rios. At that time he asked a question, "Mr. Rios, what was the date that Mr. Sobell was deported by the Mexican authorities?"

It was objected to, as your Honor may recall, and you sustained the objection and indicated—and you had asked Mr. Cohn, "Do you have other proof of deportation coming?"

And Mr. Cohn indicated that he did.

Subsequent to that time the prosecution tendered Exhibit 25. Now Exhibit 25 was not in truth and in fact the actual manifest. It was a conformed, typed-up copy of the actual item. And this was tendered—they sought to introduce this and establish deportation from Mexico after—and over the vigorous opposition of the prosecution, your Honor ruled that we, the petitioner, had the right to have the witness who prepared the card up here for examination.

Mr. Cohn, may I say, I believe on pages 941 and 942 of the record, felt that he was not required to bring up the witness who prepared the card but he could bring up anyone who could say "This is an official [7] document regularly prepared in the course of business."

Mr. Huggins the next day was flown up from Laredo, Texas. Mr. Huggins was an employee of the Department of Justice. He was an immigration official stationed in Laredo, Texas, for a considerable period of time. It was he who stated, amongst other things, first of all, that he advised Mr. Sobell that he had to fill out this manifest—this Exhibit 25-A—because he was deported, and that an entry of this sort must be made in the case of every deportee. And may I say, as an aside, that the Court of Appeals in going over that testimony, made the same reference, that this was a business entry, regularly made because every deportee must make this entry.

Further, he testified that he was brought there to Laredo, Texas, by the Mexican authorities acting in their official capacity—page 1026 of the record.

He was dealing at that time with the Mexican Security Police.

He also testified that this was based on his information and observation with reference to the deportation.

It was at this time, after the voir dire, that Exhibit 25-A was accepted into evidence.

[8] Now the question of the deportation, the flight, once again came before the Court at a later stage in the proceeding. Mr. Sobell, through his counsel, Mr. Phillips, introduced an affidavit in support of a motion in arrest of judgment, and that affidavit said, No. 1, he was illegally seized; No. 2, after being seized he was assaulted and denied the opportunity of getting in touch with the United States Embassy; and, No. 3, he was brought to the United States by these people who seized him—and that was the motion in arrest of judgment, on the ground that the court had no personal jurisdiction over him by reason of the illegal seizure.

Your Honor at that time—Mr. Saypol argued in opposition and amongst other grounds for disposing of the motion adversely to the petitioner, he stated that this affidavit was false. He said it was false in two respects: No. 1, that he didn't enter with a tourist card but entered—rather—

The Court: With a visa.

Mr. Perlin: I am sorry—with a visa. He did not say anything about a tourist card at all. He said the statement that he entered on a visa was false and that he was literally kicked out as a deportee, and that he was personally acquainted with the facts from the [9] time of his seizure in Mexico to the final act of deportation, and "the act of deportation" are the words used by Mr. Saypol.

At that time in arguing, in opposition to the motion, he also alluded to the Dixon case, which deals with the matter of personal jurisdiction.

Now this matter did not rest at that stage either, your Honor, because these were some of the issues that were raised in the Court of Appeals—and in examining the brief in the Court of Appeals—and I particularly refer to pages 34 and 37 to 40, you have the government arguing there that he was lawfully removed by the Government of Mexico to the United States.

This brief is signed by Mr. Cohn, who was one of the attorneys for the prosecution in the course of the trial.

At that time he further indicated that we had adduced no proof of United States participation or knowledge or instigation of the acts.

Now your Honor, on the basis of these facts, primarily those relating to the trial here within this Court's jurisdiction, we make admittedly some very serious charges—charges that constitute not only an abuse of the processes of this court but also charges that did harm to the petitioner and charges which invalidate the sentence [10] and conviction and warrant his discharge.

Those charges, your Honor, are as follows: That the testimony that Huggins gave as to deportation was false; that Exhibit 25-A—

The Court: In what respect?

Mr. Perlin: That he was deported from Mexico—and this was—

The Court: If I remember the testimony, didn't he say very specifically that this was based on his own observations, and it was not based upon any legal document or not based upon anything official by the Mexican Government but because he saw nine Mexican Security Police, I think it was, he said, there, he assumed that there was a deportation.

Mr. Perlin: He did not say "assume", your Honor.

The Court: Well, he said he based it on his observation—in other words, clearly and distinctly pointing out at that point that he did not want to give the impression that when he wrote the word "deported" that he meant a legal deportation proceeding in Mexico. I think it was obvious from what he said. As a matter of fact, if you recall, Mr. Kuntz argued in summation that the government had not established any legal deportation.

[11] Mr. Perlin: Your Honor—

The Court: I think Mr. Saypol said in summation he practically agreed, he was kicked out and picked up by the FBI.

Mr. Perlin: Your Honor, I submit the reason Mr. Huggins went no further than he did and made no claim that the Government of Mexico deported him legally, in these exact words—although that was the imputation to the jury—is because he knew that it was a lie, because he was informed by the Government of Mexico a day after the kidnapping that there was no deportation, and that is why he sought to evade the implication of that knowledge.

The Court: Now wait a minute. These facts substantially are the facts contained in a motion for arrest of judgment, were known to counsel, they said so, and in the motion for arrest of judgment substantially the same allegations were made as are being made now by you: that Sobell was kidnapped, he was abducted and he was brought over, taken by these authorities and brought over to Laredo, Texas—substantially.

Now these facts were in the possession of counsel. I think I pointed out at that time, and I think the Circuit Court, Judge Frank pointed out in his opinion that with these facts in their possession, No. 1, Mr. Huggins [12] was not questioned at all—at least this is my observation—concerning Mr. Sobell's condition. Now he was allegedly just beaten a few hours before, and he was knocked unconscious, and here is Mr. Huggins who, as you said just now, testified that he requested Sobell to sign the manifest and told him "This is always necessary in a deportation proceeding." And here is Sobell, an intelligent man, with quite an educational background, who signs this, and yet not one question is asked of Huggins about what was his physical condition, did he appear dazed, was he bloody or anything of that character—when these facts are known at that time to the defense.

Mr. Perlin: Your Honor, I am going to come to that question a little later but I may say, just as an aside—

The Court: Would you prefer that I don't ask you questions?

Mr. Perlin: No, your Honor, I don't want to give you any such inference. I appreciate your asking questions because it is of help to me in dealing with the matters which are on your Honor's mind.

May I say, though, particularly on that fact, without going into detail because I intend to dwell at some length on those issues, the fact is that while they [13] may have or known the facts which may have established the absence of deportation, they did not know the facts that established that the government knowingly used perjured testimony, and that is the matter that is being litigated in the present instance.

The Court: And what do you base that on, that they knowingly used perjured testimony?

Mr. Perlin: That is what I want to get into right now—I will go into the facts.

The second basis of the petitioner's—I will give it to your Honor in outline and then I will go into the details of the facts and argue on it.

I am sorry that I did not submit a brief in support of the motion—I have given it to Mr. Williams—for the Court's aid (handing to Court).

Second of all, the petition charges that the government suppressed certain facts favorable to the petitioner, and impeaching its own testimony and evidence.

No. 1: It suppressed the fact that the government had been advised by Mexico, the government officials of Mexico. that he had not been deported but in fact was illegally seized. They suppressed the fact that the prosecution, through its agent, who planned and [14] executed the kidnapping—

The Court: May I interrupt you for a moment?

Mr. Perlin: Yes.

Colloquy

The Court: Do you agree with me that there is not a suppression of facts if it is known to the defense? And you do agree with me, I believe, that the defense knew that he was not legally deported.

Mr. Perlin: But the defense, your Honor, did not know that the Government of Mexico had told the prosecution that he was not deported.

The Court: What difference would that make as to the point you are trying to prove, that there was not a legal deportation and the defense knew it?

Mr. Perlin: Your Honor, when the government uses perjured, false evidence, known by it to be false, the fact that the truth or falsity of the evidence may have been litigated, but not all these facts about the knowing use, is of no bearing to a proceeding under 2255—because, your Honor, no one has to carry such a burden. It is enough when a person is a defendant in a criminal case, when he has imposed against him the prestige and the authority of the government, to have—it is difficult enough sometimes when false evidence is produced—we all know that. It is difficult enough there but it is impossible when the [15] government knowingly uses false testimony, and that is a burden that no defendant by law is required—

The Court: I understand, I understand, but I just want to make this clear: You are contending here that because the government had knowledge, you say—that he was not legally deported, that that constituted a suppression of evidence.

Mr. Perlin: That is correct, your Honor. Further—

The Court: Wait.

Mr. Perlin: I am sorry.

The Court: And, further, that they used perjured evidence when they permitted Huggins to take the stand, and then introduced this document—is that correct?

Mr. Perlin: That is correct.

The Court: Very well.

Mr. Perlin: I am sorry.

The Court: Will you clarify this for me in my own mind—

Mr. Perlin: Yes?

The Court: —the government's position was, as I recall it—or is, maybe in these papers that I have read—that the sole purpose—and you do agree with me on this—that the sole purpose for the introduction [16] of this evidence was to establish that he did not come back voluntarily, whether it was a legal deportation or whether it wasn't a legal deportation was not material, they say.

Mr. Perlin: No, your Honor.

The Court: I want to hear you on that, I want to hear you on that. They say the whole purpose was to show that he came back involuntarily, and that everybody understood it, including defense counsel, and the summations indicated that everybody understood that is what they were trying to establish, was that he was ejected or thrown out of the country, and that it wouldn't add one iota—indeed it would hurt you if they established that there was a legal deportation because then it would rise to the heights of having a legal adjudication.

Mr. Perlin: Your Honor, that is just what they attempted—the import, not only that he was returning involuntarily, they suppressed the fact that he was denied the opportunity to voluntarily return, and they reported to the jury that it was the Government of Mexico which—who had resorted to legal proceedings.

The Court: Now are you saying, therefore, that if the defense knew this, they sat back and did nothing about it, did not even call it to the Court's [17] attention in the many conferences at the bench, outside the presence of the jury—they cannot, years later, in a 2255 proceeding, come forward and show the fact that we knew it, the fact that they knew it, and were insisting that the government—tried to

show at that time that it was an illegal deportation—that does not excuse the conduct of the government, and you say "We have a right to raise it now"?

Mr. Perlin: Your Honor, I am afraid I am not making myself clear, because what I mean to say is that the operative facts that we are dealing with here were not known to the defense in the course of the trial. He did not know, No. 1, that the government—this prosecution—had been advised that he was not legally deported—

The Court: Can—

Mr. Perlin: If I may finish, your Honor.

The Court: I understand that.

Mr. Perlin: He did not know that the United States executed the kidnapping.

The Court: But he did know, didn't he, according to him, that he had been kidnapped, that he had been abducted and that he had been thrown over the border, and therefore he knew he hadn't been legally [18] deported. Isn't that true, Mr. Perlin?

Mr. Perlin: Your Honor, I cannot say whether or not he knew whether at that stage he was legally deported. He was faced with a certified document from the Department of Justice which says "Deportation from Mexico". He had an immigration official, an immigration official of the Department of Justice saying "deportation". That imputed a certain thing, a certain meaning, when it also comes from the mouth of an attorney versed in the field of deportation—when it comes from the mouth of an immigration official.

The Court: Mr. Perlin, within a week after the verdict there was a motion in arrest of judgment, and Mr. Phillips then said that he knew all of these facts, and at that time he was making the point that he hadn't been legally deported, that he had been kidnapped and he had been abducted and he had known these facts, and so he knew that he hadn't been legally deported and had been abducted.

Colloquy

Mr. Perlin: Your Honor, suppose we had a murder trial, to give you another example—and a person is convicted wrongfully by perjured evidence, that he never killed this man, and he is convicted, and he knew it—well, you know, your Honor, there are cases where you can't [19] do anything about it, but when the prosecution knew that the witness was giving—that the prosecution was knowingly giving false and perjured testimony, then something can be done about it.

The Court: Do you tell me that in a case where the defense knows there is perjured testimony they can sit back and not challenge the perjured testimony, knowing at that time they have evidence available that there was perjured testimony—for example, in this case, you had practically all the evidence you have today. Your counsel had subpoenaed records from the Mexican Government—that was in the record; the Mexican Government appeared, presented the records, and Mr. Kuntz then said, "We don't want them." In other words, there were very, very able lawyers representing Mr. Sobell—Kuntz and Phillips, very capable lawyers. They knew all of these things. They had subpoenaed documents.

As a matter of fact, there was a lapse of 24 hours, if I remember it, between the introduction of this document, between the offering of the document and the introduction in evidence of the document. They had 24 hours in which to call the Court's attention, if need be outside the presence of the jury, which they had done time and time again, that they believe there is perjury [20] here, that they want a voir dire examination, and so forth. I mean, these were capable lawyers—

Mr. Perlin: But, your Honor, if I may submit, they did not know all the facts here. They did not. It took more than 24 hours—it perhaps took much longer than 24 hours to find out that the prosecution arranged the kidnapping without the consent, knowledge or approval of the

Government of Mexico. That was not known to them, your Honor, that the prosecution—that Mr. Saypol or Mr. Cohn were knowingly tendering false evidence. And, your Honor, if he knew—assuming for the sake of argument he knew that he was not in fact deported, nevertheless he did not know that he was removed without the consent of the Government of Mexico—he did not know that, and the Court of Appeals brief indicates no knowledge of that. He asks for a hearing to get those facts.

And, your Honor, it little falls in the mouth of the prosecution to say that they were not talking about legal deportation, because I would refer to page 39 of the brief—generally pages 38 and 39 deal with the matter—and they say, in answer to his motion about physical assault, "Even if it is true, as Sobell alleges that he was beaten by the Mexican police, such mistreatment [21] would hardly invalidate his deportation."

Your Honor, was the prosecution there arguing about physical kidnapping? They were arguing about deportation, as everyone knew it to mean, and the jury would have been impressed as to what it would mean, as the defense was impressed as to what it would mean and as the prosecution was. At this stage to claim, because there might have been evidence that he knows from his limited personal knowledge, is no defense to the fact that it was data he did not have. He did not know that the FBI, a day after his kidnapping, was in his home down in Mexico City. He did not know that this thing was planned by the prosecution. He did not know that then.

The Court: Well, isn't it true that the card—the manifest in which he said "deported", had no more weight than Huggins' testimony gave it? And Huggins' testimony was to the effect that it was based on his own observation—

Mr. Perlin: No, your Honor.

The Court: —that he did not speak to any Mexican officials about it—he said that specifically. Did the card

have any more weight than Huggins, who laid the foundation for its introduction later?

[22] Mr. Perlin: Your Honor, I find that difficult for this reason: The prosecution gave it some more weight—

The Court: Where?

Mr. Perlin: If I may finish, your Honor.

The Court: Yes.

Mr. Perlin: —and it had such meaning and such import that you had three quite experienced Judges in the United States Court of Appeals, who read the record, who read Huggins' testimony—and what did they say? They said, "This was introduced to establish 'legal deportation'".

That is what the Court of Appeals ruled on, your Honor, at the time they were ruling on it. Now the government says the prosecution did not really mean it, that they never informed the Court of Appeals that is what they really meant.

Your Honor, there was suppression and there was knowing use of false testimony, and it was carried through to the Court of Appeals, in effect, deceiving the processes of that court.

I will read page 603 of that opinion which refers to the matter—as a matter of fact, the government's answering affidavit deals with that point.

[23] The Court: But didn't the Court of Appeals also say that the evidence was of a type both irrelevant and hearsay, but Sobell's forced return to the United States was certainly relevant to the government's theory that he had fled to Mexico to escape prosecution—and the inspector who made the entry testified at the trial and was questioned on cross-examination as to the extent of his observations and his reasons for making the entry.

Mr. Perlin: Of course, your Honor, because the Court of Appeals had assumed it was a legal deportation, he had an opportunity, if there was a legal deportation, to make

a voluntary return, and if he were returned forcibly, pursuant to legal action and judgment on the part of the Government of Mexico, obviously it is an involuntary return. If a man is kidnapped out of his home in the middle of the night, it is not such an involuntary return, and the facts were in the knowledge of the prosecution and not in the knowledge of the defendant, and they used that, nevertheless, knowing it to be false.

The Court: But you are getting back to the basic premise again, as the Circuit Court seemed to indicate—wasn't that the primary purpose here, to establish that he came back, on the government's part, involuntarily and therefore wasn't all this information [24] in your possession to establish that he came back involuntarily?

Mr. Perlin: Your Honor, he couldn't have come back voluntarily had he wanted to, because he was physically seized—he wasn't given the opportunity to do so.

The Court: Well, wait a minute. He had the opportunity at the trial, and his wife was there, and she had the opportunity—the facts were available.

Mr. Perlin: Your Honor, is it your import that when the government knowingly uses false testimony—

The Court: Wait a minute.

Mr. Perlin: Well, that is the first thing we have to assume: If the government knowingly uses false testimony, your Honor, if the prosecution lied to the court, your Honor—yourself and the jury and to the petitioner—the petitioner does not have to take the stand to overcome knowing use of perjured testimony, particularly when he doesn't have all the facts available.

The Court: Didn't Judge Frank point out in his opinion that it would have been very likely that something would have been done, and I think he says here some place that he made no move to bring to light the facts of his alleged illegal abduction; he preferred to [25] take his

chances on the verdict, withholding the trump card until the trial was over.

Mr. Perlin: You Honor, he was talking about personal jurisdiction.

The Court: I agree with you.

Mr. Perlin: He wasn't talking about the government knowingly using false testimony. He did not know it then.

The Court: The question there is whether under any circumstances the defense has an obligation of what you are pointing out here—you should have made a motion in advance of the trial contesting personal jurisdiction.

Mr. Perlin: Would that deal with the knowing use of perjured testimony, your Honor?

The Court: If he knew, for example, that they never obtained personal jurisdiction over him and it had been obtained by unlawful means, by kidnapping and abduction, the way to test that is by motion in advance.

Mr. Perlin: That is with reference to personal jurisdiction, but that does not deal with the fact that the government knowingly used it. Most defendants cannot tell what evidence is coming, let alone when it (the prosecution) is knowingly using false evidence.

[26] Now with reference to the misrepresentations to the court, we say, without going into details—I will come to it a little later—that there two aspects of the misrepresentation: The claim of an act of deportation, that he was literally kicked out as a deportee, and the statement that the visa claim was false.

Those are the claims on the basis of the misrepresentation, your Honor—and I will come to its significance and meaning in a little while.

I must say this, that there are in this petition many facts indicating that the government planned and participated in the seizure—of the illegal seizure of the petitioner from Mexico. There are facts here establishing knowledge, guilty knowledge, if I may say, your Honor, on the part of the prosecution, a showing now in this petition—and I

have read some of the petitions here in the Southern District of New York in which hearings have been granted, and in other districts—far higher—far higher than one normally finds. Yet while the government has answered purportedly on legal grounds, we find the unusual situation, to very specific charges—to very specific charges of misrepresentation and perjury—we find not one—not one affidavit from those who would be in any position to deny it.

[27] Now we may argue what Huggins may have meant—Huggins' affidavit is not here.

We may argue what Mr. Saypol meant. Mr. Saypol's affidavit is not here—and that goes all right down the line.

Your Honor, these facts are true, and they establish a claim that is relied on under Section 2255. Now getting to the facts leading up to the kidnapping, I would like to spend a few moments giving you some factual background.

Mr. Sobell left with his family on June 22nd or June 21, 1950. He left in his own name. He had a tourist card—and may I say, your Honor, as to the tourist card, Mr. Williams properly in his answering affidavit alludes to the fact that the petitioner does have a tourist card; that had never been stated before by Mr. Saypol or the prosecution in the course of the trial. Further, when he went to—

The Court: But it was known to you—by you I mean the defense. They knew he had it.

Mr. Perlin: That is right, that he had a tourist card; also it was known that it was taken away from him, and he did not know where it was at that stage.

The Court: Are you urging seriously that the [28] counsel would not know where to obtain a copy or a record of it—

Mr. Perlin: No, your Honor, he knew he had a tourist card but nevertheless that was created as an issue in the misrepresentation of Mr. Saypol to the court. Now he entered Mexico legally, lawfully, properly, and by plane. He went through Dallas, Texas, and when he went to Dallas, Texas, he got off, registered his camera for the

customs officials because he would otherwise have to pay taxes or customs' fees upon his return; went on the plane and entered into Mexico with his tourist card and with his family.

Now your Honor, the petitioner planned to and would have returned to the United States, but something intervened which prevented him from doing so, and that was the abduction that took place on August 16, 1950.

The Court: How do you explain this—which has never been explained—the use of the aliases—at least five aliases while in Mexico, and the use of Danziger for the purposes of transmitting letters—and the use of aliases there?

Mr. Perlin: I believe on page 864 of the record he indicates—Mr. Danziger indicates in one of the letters Mr. Sobell indicated he would be returning.

[29] The Court: That is right, and I say there never was an explanation—indeed, Mr. Kuntz brushed it aside in his summation, but the fact remains you said that the primary element is voluntary versus involuntary return. Delos Rios—I believe his name was—testified that Sobell said to him that he was fleeing from service in the Army—I believe that was his testimony in substance, and that he wanted to get away, and how does a man get out of the country here without the use of papers? I believe that is it in substance.

And Bautista and several others testified about trips to Tampico and trips to Vera Cruz.

Mr. Perlin: One trip to Vera Cruz and one trip to Tampico.

The Court: Under an alias—the use of an alias, registering in a hotel in Tampico and in Vera Cruz under the name of—under an alias.

Now there never was any explanation of that. Now you come in and say he planned to come back to the United States, but it was never explained at the trial, and that portion of the flight testimony remained unrefuted.

Colloquy

Mr. Perlin: May I say, what is the significance of the false testimony, knowingly used? If your Honor please, it is this, it is a fact on this motion, [30] and if the government contests this point (his planned return), whether or not he explained it at the other trial, then we have an issue of fact that would warrant a hearing and put Mr. Saypol on the stand—and Mr. Sobell is ready to testify on those matters.

Now, your Honor, on the night of August 16th, coming back to that point on the evidence that the government has suppressed—three or four officers—I am sorry—policemen, Mexican Security Police of the City of Mexico—and, by the way, their jurisdiction is limited in the same way as the police downstairs—in the New York City Police Department is limited—local police, perhaps even cops off the beat were around, a special staff. They came in and informed him that he was wanted for robbing a bank in Acapulco. They seized him, assaulted him, took his documents and denied him an opportunity to get in touch with the United States Embassy.

Subsequently he was brought before the police—by the way, not to the immigration offices, and there are special immigration offices, as it turns out, for deportations—and then his family was brought there, and subsequently he was thrown in a car, and his wife and children in another car and brought up to Laredo, Texas. On the way [31] there were numerous phone calls, and when he arrived he was advised by the FBI that they were waiting for him. He had kept them waiting several hours. At that time an FBI agent crossed over to Mexico—in itself an unusual matter—and entered into the car and went over into the United States. Waiting for him in this "normal" deportation and in the regular course of business, 3:45 in the morning, was a matron and a doctor to arrange with reference to the children, and to give them vaccination

shots. It turned out they didn't need any, so no shots were given.

At that time these Mexican police who were acting without any authority or sanction of the Government of Mexico, turned over what documents they had to the FBI.

Now these documents, you will notice from the exhibit—a number of them bearing the initials "RIS"—Rex I. Schroeder, agent of the FBI, sent there by the prosecution in arranging for this matter.

Now the government doesn't seem to contend very seriously, except in a new definition of the term—the Government of Mexico did deport Mr. Sobell. They (the Government of Mexico) never did. Mr. Huggins knew it; maybe the prosecution did but surely the Government of Mexico never heard a thing about it until they read it in the papers in [32] Brownsville, Texas, the next day.

If they deny that was not a deportation by the Government of Mexico—an expulsion or ejection by the Government of Mexico—any action by the Government of Mexico, your Honor, we have not seen it, and if they do, we have a significant issue of fact which we are fully prepared to litigate at this time.

The Court: Let me ask you, your basic proposition therefore would be that the government never obtained jurisdiction over him personally, am I right?

Mr. Perlin: We will deal with that in the second motion.

The Court: Well, I would like to have it here because I want to put these facts in the proper posture. I want to know what the relevancy is—and if that is the fact and if you prefer to answer it later, I want you to think about my question anyway—if that is the fact. Then Judge Frank says you were foreclosed because it should have been made in advance of the trial. Certainly the motion in arrest of judgment raises the same point, and the appeal decided that.

Mr. Perlin: No, your Honor, I must disagree—

The Court: All right.

Mr. Perlin: Because the knowing use of [33] perjured testimony was not ours. That is the position we are taking. I am not talking in this motion about the illegality or what effect it had on his personal jurisdiction or the personal jurisdiction of this court. I am saying only one thing, that the government used false testimony, knowing it to be false.

The Court: Now please don't lose sight of this fact, and I ask you not to in your argument, and that is, that the Rules of Criminal Procedure set up machinery by which questions of personal jurisdiction are raised.

Now we do not have any question here but that your client knew—you said that he was abducted, that he was beaten, that he was ejected from the country, therefore, those facts were known to him upon the occurrence of the event and were known to his wife, and were undoubtedly told to his counsel, the time to have questioned that was in the due time provided for by the rules. Let us put aside the allegations of perjured testimony. How was that answered? By—

Mr. Perlin: Your Honor, perhaps—

The Court: —by simply saying—

Mr. Perlin: We have a large area of agreement, and this is it—I am not here urging the matter of [34] personal jurisdiction of the defendant at this time. That was litigated, the personal jurisdiction of the defendant. That was obviously litigated, and Judge Frank said they raised that too late and it couldn't be litigated or considered by the court, it had been waived. Your Honor, if we were dealing with the matter of personal jurisdiction, we are out of court. I confess error; but we are not dealing with the matter of personal jurisdiction. We are dealing with the matter of knowing use of perjured testimony, and the

reason I bring in the fact of the deportation is one other fact to establish the falsity, and the fact that the government knew it, because the very port of Nuevo Laredo, through which he purportedly was deported, your Honor—it is not very far apart, from Nuevo Laredo and the City of Laredo—that bridge—that their offices knew he was not deported, and we have a certification from that office that he was never deported. And Mr. Huggins was not so far away or unfamiliar with these facts that he would be completely unaware of these facts.

Now, your Honor, I would also say this, that the three charges of suppression, knowing use and misrepresentation, all are, in certain respects, inter-related, although there are independent legal grounds [35] for each of them which would warrant relief. It flowed out of the illegal seizure. It flowed out of it. Perhaps when you do something bad in the beginning, it always remains bad, rotten and corrupts everything it touches, and perhaps in some way it corrupted this court's processes unbeknown to this court.

Now at the time of the seizure in Mexico, the United States prosecution was notified and they sent down three agents: Frutkin, Shroeder and Lewis, also there was a Mr. L. C. Taylor, an FBI agent who is permanently established or assigned to that area, and who also crosses over into that area of Mexico—they are permitted to do so, and deal with the other immigration officials—and, by the way, I think we can presume without too much argument that they were aware of the procedures on deportation.

After the FBI was notified in Laredo, Texas, of the coming of Mr. Sobell, they went over the bridge to get him, as I indicated. Mr. Sobell at that time was searched, certain things taken, and he was placed under arrest.

He was in a state of physical condition which indicated that he had been assaulted. I may just say, your Honor, as an aside again, that this was not a [36] circumstance which Mr. Huggins knew was taking place in the regular course of

business. Within a day of that seizure, officials of the Government of Mexico, learning of it through the newspaper, instituted an investigation of this illegal act, and they notified Huggins that there was no deportation, it was illegal and without the consent or knowledge of the Government of Mexico, and they expressed their alarm about this infringement upon the sovereignty of the Government of Mexico.

At the very same time—

The Court: May I pose a question?

Mr. Perlin: Yes.

The Court: Why didn't the defense—I am curious—raise the question of lack of personal jurisdiction if this was all true?

Now you will agree that Kuntz and Phillips are able lawyers, and that went directly to the question of lack of personal jurisdiction, didn't it?

Mr. Perlin: Your Honor, many things might have been done but the question posed here is, are we foreclosed—

The Court: No.

Mr. Perlin: —from going into knowing use?

The Court: I agree but I would like an [37] explanation.

Mr. Perlin: Well, your Honor, I submit that is something that would have to be asked of Mr. Kuntz and Mr. Phillips.

The Court: All right.

Mr. Perlin: Now this information was given to the FBI down in Laredo, Texas.

Now Mr. Lewis, who, working closely with the prosecution, actually sat at the prosecution's table at the time Huggins was on the stand and in fact practically sat there throughout the trial—this after having been advised in Laredo, Texas, that there had been no deportation. And the close cooperation of the FBI with the prosecution is no secret or no improper thing—that is the way the prosecutions function, in close coordination.

As a matter of fact, Mr. Saypol alluded to the great help that he had obtained from the FBI in the course of this case, and Mr. Saypol indicated his knowledge when he said that he was aware of the circumstances, from the time of the seizure until the time of the arrest in Laredo, Texas.

Now, your Honor, there are certain other facts which I will not go into too much detail, which would further establish no deportation, that the prosecution [38] knew it—not too much at this time—not too much at this time, such things as the treaty provisions which require notice and things of that sort.

Now in fact not only did the prosecution know it because Obregon had informed them but they knew it because they did it through their agents and representatives, through FBI agents stationed in Mexico.

They were involved in the beginning, and they knew that he had been denied the opportunity that normally would be available to anyone, had they informed the world or him that they wanted his presence in the United States.

On the very afternoon of the kidnapping, you had a United States agent in Mexico City come to the house of the petitioner and say he was wanted now for a new crime: kidnapping a small child—kidnapping a small child, and they wanted to know what apartment he was in. They couldn't tell him. They said to come back a little later.

A woman came back a little later. Purportedly she had been short changed or she had given too much money to the petitioner's family at a supermarket, and she wanted to know the apartment. She is told the apartment by the superintendent of the building—and what happens? She doesn't go up there to collect her money, your Honor. She runs away in a taxicab and leaves.

[39] At around eight o'clock that evening, the Mexican Security Police of Mexico City are there, advising certain people not to interfere with the seizure. The facts of the seizure are already described, the way he was seized from his apartment.

That very same night, Mr. Rios' wife—you will recall him—he was the one you were alluding to before, your Honor—saw two or three of the people involved in the kidnapping. The reason she saw them was because the children had been left without their parents and she took them in her house to take care of them.

The Court: But let me ask you this—I hark back to this because I do want to be satisfied on this score in my own mind—

Mr. Perlin: Surely.

The Court: —all these facts were known to your client.

Mr. Perlin: No, your Honor.

The Court: Well, the fact of the abduction was known to your client. It was known to your client's wife.

Now the query that I want to put is: Can you, under the law, knowing these facts, hold back at a trial, not produce these facts and then subsequently produce them [40] either on a motion for arrest of judgment or under a 2255 proceeding?

In other words, in every trial, does it not become a contest between what the government says on one side and what the defendant says is not true but perjurious? Is there anything unusual about that? In most criminal trials you have that type of a contest, the defense saying that the government witnesses are not telling the truth and "We have the true version."

Therefore the question is, knowing the true version at that time, or substantially all of the true version at the time of the trial, how can you justify holding them back and raising them immediately after this trial, and then five years after the sentence?

Mr. Perlin: Your Honor, there are two things: First of all, they did not know that the United States planned and participated, that they were there the night of the kidnapping—

The Court: Just a moment. They did know, didn't they, that the government had introduced a card on Hug-

gins' testimony—they knew it at the time, that many decisions have to be made by lawyers quickly during the course of a trial. In a criminal case the lawyers do not know what the government is going to produce [41] generally, but they did know from their clients that there had been an abduction, as claimed, and a beating and a kidnapping. Therefore they did know at that time that the government, as you say, was charging deportation, legal deportation, and they did have these other facts to contest it.

Mr. Perlin: But, your Honor, they did not believe or know at that time, or had the basis for claiming that the government knowingly was using false testimony.

The Court: What difference would it make for their purposes? In other words, as an element of good faith, would they not have at that time contested this evidence?

Mr. Perlin: Your Honor, it doesn't make a bit of difference—talking about good faith, once the prosecution uses false testimony, knowing it to be false, the courts do not say "This is a game of chance, that you can let them go unchallenged."

The Court: That is right. The defense must challenge it.

Mr. Perlin: And they challenged it when they had the card and they have the knowledge, and we challenge it right here and now.

The Court: But they had the knowledge then.

[42] Mr. Perlin: We did not, your Honor.

The Court: Substantially.

Mr. Perlin: No.

The Court: Didn't they know he was kidnapped?

Mr. Perlin: They did not know that the government was knowingly using perjured testimony.

The Court: Didn't they know that he had been beaten, abducted and pushed across the border?

Mr. Perlin: We did not know that the United States had done it. It is a difficult thing to imagine, your Honor, that it was done without the consent of the Government of Mexico, that the United States went illegally into Mexico and planned this. Yes, agents in Mexico, unlawfully and improperly, in violation of international law. They did not know that, no, your Honor. And I think these are the operative factors that make and establish our "knowingly using" charge today, and it warrants relief.

Plus the fact, if I may say, your Honor, that the United States had been advised by the Government of Mexico that there was no deportation.

Now, your Honor, at the time of the kidnapping, on the evening of that day, a domestic worker who worked for the petitioner came back. At that time she was [43] joined by two or three of the secret police. She was advised that they were acting at the behest of the Government of the United States, that further they were going to clean out the apartment and take away the personal effects.

As a matter of fact, in their zealousness they not only took Sobell's belongings but they took this young woman's belongings, too.

By the way, these belongings which she wanted to keep, she objected to that, and she finally, a day or two later, asked "Where are they? I would like to get them back."

And where were they, your Honor? As the petition indicates, they were in the United States Embassy in Mexico, the United States Embassy in Mexico.

Now after the seizure, within a day of two after, Mr. Rios is seen. And who is he seen by?

Mr. and Mrs. Rios are seen, your Honor, by an FBI agent in Mexico and two of the kidnappers—two of the kidnappers at the same time.

Your Honor, we did not know that. The prosecution did not tell us that. And it is a heck of a hard time to find it out, when these things are done. It is not proclaimed to the world. They are done secretly.

[44] At that time, by the way, Rios was seen three or four times in Mexico by the FBI.

He was seen by Mr. Cohn and Mr. Saypol and the FBI a day or two after the kidnapping—and the property, documents, belongings of Sobell, which were shown to Mr. Rios—and questions were asked with reference to them. And then there were further subsequent investigations, as alluded to in the petition.

And I don't want to repeat all the details of those investigations—of the FBI going to Vera Cruz and Tampico and those other areas and conducting an investigation—about Mr. Cohn and Mr. Saypol conducting an investigation in Mexico. That is included in the petition itself.

Now, your Honor, I honestly think, and I think it is apparent on the face of the petition, that the prosecution knew that what they had done was wrong. They knew there was an extradition treaty—and, by the way, such legal effects of the violation of the extradition treaty Mr. Kinoy will argue as to that.

They knew that he was not even extraditable under the laws of this treaty and under the laws of Mexico. And they were faced with the problem, if they asked for his return, he would have returned, and that would have [45] constituted a damaging blow to their case.

The Court: How did they know that?

Mr. Perlin: They knew he might be—

The Court: You say they were faced with a problem—I ask you, in the face of the evidence which they had, due to their investigation, that he had been using these aliases throughout Mexico, how would they have known it?

Mr. Perlin: I didn't say they had that then, your Honor.

The Court: What?

Mr. Perlin: I didn't say they had that at the time—at the time of his seizure they knew nothing about it. The FBI did not know about it then, your Honor.

Colloquy

The Court: At the time of the seizure the FBI did not—

Mr. Perlin: Knew about these aliases? Knew nothing about these aliases, not a thing.

The Court: And therefore the claim you are making is that at that time he was entitled to the benefit of the—

Mr. Perlin: They did not know what he was going to do, to put it in the most understated manner—as much as possible, they did not know.

[46] The Court: I see.

Mr. Perlin: They did not know about Vera Cruz and Tampico.

Your Honor, on the basis of this showing and under the law applicable to 2255, in view of the fact that none of these facts have been contested, I think on the basis of that we are entitled to a hearing.

I just want to proceed—to allude, in conclusion, to some of the questions raised by the government in its answering paper. First of all, they do not challenge the legal sufficiency of the knowing use branch of this motion. They do not challenge it. They give, instead, three arguments:

No. 1, that there was other evidence—Flitcher, et al.—some of which you have alluded to today, your Honor—with reference to guilt.

Your Honor, under the principles of writs of habeas corpus, under 2255, under Mooney vs. Hollohan, and the decisions of the court, it doesn't make any difference.

And if the prosecution can use—as it did in the Coggins case, to button up its case with false testimony, knowing it to be false, whether or not the other evidence is believable or would have sustained the [47] conviction, the courts do not inquire into that. The two processes have been despoiled and the conviction must be set aside.

Now on the question of relevance I have a little difficulty in arguing with reference to the government's position—perhaps after their argument I may be able to reply more directly to it.

Colloquy

They say the evidence is relevant, and of course material, and because the Court of Appeals held that it was relevant and material, and your Honor held that it was relevant and material—but it was not so relevant and material, I gather—that is the point that the government makes.

Your Honor, once again, going back to the first point, they used evidence—they went to great efforts—they brought somebody up here from Laredo. Deportation figured in the case. It little behooves them to say now "Well, maybe we could have done without it"—but they did not do without it. It was presented, your Honor. It was false and they knew it to be false.

Now, finally, they say, "When we say 'deportation'" the prosecution in the trial—naturally I recognize Mr. Williams' position is difficult. He cannot speak for Mr. Saypol. He cannot speak for Mr. Cohn. He was not [48] United States Attorney at that time. He did not know their operations of their minds at that time. He said, "Maybe we didn't mean legal deportation or deportation by the Government of Mexico. All we meant was a physical seizure and a kidnapping."

Well, your Honor, as I have indicated before, earlier in the argument, the Court of Appeals decision disposes of that. The brief on the part of the prosecution disposes of that, and rather than repeat them, I think we have them in our reply affidavit, where time after time legal action of the Government of Mexico was claimed to expel and deport him—they were not talking about a kidnapping, your Honor.

And may I say this, that they were aware—the prosecution—at the time the court rendered its opinion—the Court of Appeals—what the court thought it was.

There was a petition for rehearing, your Honor, and that petition for rehearing—neither Mr. Cohn nor Mr. Saypol nor none of the prosecution staff came in and said,

"Your Honor, that is based on a false misconception. We never intended to prove legal deportation. We just wanted to prove a kidnapping."

No, your Honor, they did not do that.

[49] In any event, your Honor, if it has tried to construe the inexpressed intention of the prosecution, which is not reflected in the record, but which is refuted by the record, by their arguments and their statements to mean something else, that is what you meant and that the Court of Appeals held it to mean—your Honor, I think we have a question of fact, and I think Mr. Saypol's and Mr. Cohn's presence in the course of a hearing will be required to dispose of that matter.

Now on the question of the tourist card-visa misrepresentation, it is now contended—and once again I say, your Honor, that Mr. Williams has a difficult problem because he did not make those representations. He made no such statement. He did not know then and does not know now what was the mental operation of Mr. Saypol's mind at the time he spoke to you and said the whole affidavit was false in that there was no visa, and was not Mr. Saypol trying to infer to the court that this affidavit should not be given credence? Was it trying to infer to the court that this—that his entry into Mexico was illegal, and hence he had to be deported?

The Court: Well, was there a visa?

Mr. Perlin: What?

The Court: There was a tourist card.

[50] Mr. Perlin: A visa and a tourist card the government says are the same thing. They represent the consent of the government in which you intend to go into, to enter their border.

As a matter of fact, Mr. Saypol knew what was meant by a visa. Mr. Kuntz argued at length when he talked about it, and his affidavit said it—he was talking about going down to the Mexican Consul and getting a visa. Your

Honor, that is what he was talking about, and that is what Mr. Sobell got.

The Court: Wait a minute. Before the jury brought in the verdict, Mr. Kuntz argued—Mr. Kuntz was permitted to argue that there was a visa and there was nothing in the record—nobody interrupted him—and he argued to the jury—that he had a visa and he went under his own name—"what kind of a way is it to act?" He argued that to the jury, didn't he?

Mr. Perlin: I believe he said there was—I do not know whether he said he had a visa.

The Court: I think he said he had a visa—I may be wrong. Check the record.

Mr. Perlin: I don't know.

The Court: The point is that he argued it to the jury. Then the injury that you claim as a result [51] of—this is a motion for arrest of judgment.

Mr. Perlin: Your Honor, I say at no stage in a criminal proceeding may the prosecution fail in its special duties. Now a prosecution has a duty to do justice, not to get a conviction. They have a duty to disclose facts. They have a duty not to give misinformation or confuse the court or to mislead the court. They have a certain obligation at that time.

The Court: I agree to that absolutely. However, the defense and the counsel who are officers of the court have a duty also. Now the counsel knew and its client knew that he had a tourist card. That was no secret. He had gotten it—

Mr. Perlin: Your Honor—

The Court: —and the same thing applies with respect to the vaccination certificate. He knew he had it but how can the government be guilty of suppressing something that the defense knows about?

Mr. Perlin: Your Honor, I say they misrepresented, and the prosecution made two misrepresentations: No

visa-tourist card, and kicked out as a deportee—act of deportation. I am using the words of Mr. Saypol. And why did Mr. Saypol do it, your Honor? We may find an answer in the other motion. We may find an answer in [52] the other motion—that he had to suppress the illegality of his action, of the United States governmental action because it might possibly have influenced the court and it might possibly have had an effect upon the subject matter jurisdiction of the court. I do not want to go into it any more because it will be argued by my associate on that matter.

So this was more than just a few off-the-cuff remarks, your Honor, and I submit it did have pertinence, and whenever a prosecutor says to the court, "I think we are all aware that certain things are so", it is true it carries great weight and it should with the court. He is an officer of the court—

The Court: Well, it carries no more weight than that of defense counsel, and I charge juries to that effect. As a matter of fact, last week I had a case and I charged the jury, and defense requested it, and I said they are no different than defense counsel, and the fact that they say something is not to be taken with greater weight than defense counsel's statement. The truth is that both sides have an obligation.

Mr. Perlin: Of course, your Honor, both sides do but that of the prosecution carries more weight. He has the prestige of the government on his shoulders. [53] And when Mr. Saypol argues about the truthfulness of the evidence adduced, he alluded to the fact that a prosecutor must do justice and strike hard but not foul blows—I think that a certain mantle falls upon the United States Attorney, that has an impression upon people.

Now on the suppression motion, on the suppression branch of the motion, the government in its answering affidavit alludes solely to the documents.

Colloquy

Your Honor, I just want to indicate, because it will not be argued at length, that our suppression point is much broader than that. It is this—it suppressed the fact that they had been advised by the Government of Mexico, that the evidence was false.

Now getting finally to the prior litigation point, your Honor, before the trial, the personal jurisdiction may have been raised but knowing use of perjured testimony could not have been.

During the trial, as I have attempted to argue to the court at length, knowing use of perjured testimony could not have been argued. The facts were not available at that time that make and establish our claim.

Now the only other point gone into by the government in the answering affidavit is the motion in arrest of judgment, and as I have indicated, the affidavit [54] made no claim of knowing use. It did not even make the claim that he was not deported or that he was removed without the consent of the Government of Mexico.

As a matter of fact, in that motion and in the appeal they say it was with the consent—they assume that it was with the consent of the Government of Mexico when in fact it was not.

Anyhow, the Court of Appeals' decision clearly and decisively held—and they were only deciding one matter that could be waived, and that was the matter of personal jurisdiction. If Judge Frank thought there was a charge of knowing use of perjured testimony, then it could not be waived by being raised at that time, your Honor—that would have been perfectly appropriate, perfectly timely to raise it at this stage if they had that information.

Now there is one last question of a prior 2255 motion. Well, the grounds for the prior application I think are self-evident—your Honor, I am not going to be much longer than perhaps a minute—

The Court: Well, a lot of it might have been my fault.

Mr. Perlin: No, not at all.

The Court: Now does that complete the [55] argument on that point?

Mr. Perlin: There is one additional factor that must be brought out, and that is the question of the presence of the petitioner at the hearing, which Mr. Dreyfus will deal with.

The Court: Do you want to do it before lunch or after lunch?

Mr. Dreyfus: I will be glad to do it now—it won't take very long.

The Court: All right.

Mr. Dreyfus: Your Honor, if your Honor does order a hearing upon this petition, as I am sure your Honor will, based upon these applications, the law permits and requires the presence of the petitioner here. Your Honor knows he is a long way away, in Alcatraz—near where I practice. Indeed, your Honor, the important constitutional principles that Mr. Perlin has addressed to your Honor are very important to me. Trained in the law and living where I do—as a matter of fact, your Honor, I live right across the Bay from San Francisco in Marin County. One can climb just a little way up Mount Tamalpai—it is a State Park—and look down at the broad vista of San Francisco Bay—and see nearby San Quentin, the other penitentiary, where Tom Mooney spent [56] 22 years, your Honor, before the Supreme Court in its landmark decision, upon which this motion bears, decided that he was entitled to be heard, on the knowing use of perjured testimony against him.

And right across the way, to one's right in this broad vista of San Francisco, is Alcatraz, where the petitioner here is incarcerated.

I think the exchanges between your Honor and Mr. Perlin this morning reflected, in rich detail, the necessity of the petitioner's presence upon a hearing here—to find out exactly what went on in Mexico, his reception at the border, what did Huggins say to him, what the FBI agents

were there for, what was done and said at that time, and what was his attitude at the trial.

These are matters involving his personal participation, your Honor, at the time, which of course would require him to be present and to be heard by your Honor. Your Honor would want to hear from him, so that your Honor can make your own judgment as to him as a witness, his demeanor and credibility on these matters which have been bitterly contested.

In addition to that, your Honor, the cases hold—and I am referring to cases—they are all in my memorandum—and with special reference to the Smith [57] case—United States vs. Smith. I think it is the last case cited, your Honor, in our memorandum which particularly calls attention to the propriety and requirement of the petitioner being brought to the jurisdiction of the court in a 2255 proceeding, prior to the hearing, in order to permit counsel to prepare with him the hearing.

I know the necessities of that are perfectly clear to your Honor by my saying so. I add my own representation to the court that it is a serious matter in this case—the preparation of these petitions dealing with the petitioner's very able counsel here—and as a sort of go-between that I am, to go out and see him at Alcatraz—it requires the difficulties of correspondence and long-distance telephone calls and boat rides to the prison—it is totally unsatisfactory to adequately prepare for the hearing which I submit to your Honor must be had upon this petition.

Thank you.

The Court: We will recess at this point—now we are through with that first motion, is that so?

Mr. Perlin: Yes.

The Court: We will recess until two o'clock.

(Recess until 2 P. M.)

[58] AFTERNOON SESSION

2 P. M.

The Court: All right.

Mr. Williams: May it please the court, as your Honor is aware, this is a case which was tried before your Honor and the jury by one of my predecessors in office, but as the United States Attorney I felt it was, if not my duty, at least a right which I should exercise, to look over the entire record with my associates and see if, perchance, there was any injustice whatsoever done to this man, either in the particulars which they allege here or with respect to the conviction as a whole, and I would like to say at the outset, your Honor, that in my opinion there was a fair trial and that the jury's verdict is sustained by very substantial evidence, and that the particular points which are the subject of this Section 2255 motion are at best on the periphery, and in no sense take away from the validity of the trial and the correctness of the verdict.

In other words, your Honor, what I am saying is that I am satisfied, as the United States Attorney today, that there has been no injustice done in this case.

Now I will address my remarks to the points raised by counsel on his motion.

[59] First of all, it is contended by Sobell that there was a knowing use of false and perjurious testimony.

Second, that there were misstatements by the United States Attorney upon a motion in arrest of judgment, and

Third, that there was a suppression of evidence on the part of the government.

Taking these up in their order, there are two elements to the first point which Sobell makes. The first is, of course, was there perjury, and the second, was there a knowing use of this perjured testimony or perjured evidence. The court, of course, would never reach the consideration of the second point unless the first point is established that there was perjury or a knowing use of false evidence.

Colloquy

Now the testimony which is relied on entirely in this particular by the defendant Sobell is the evidence of one Huggins, an Immigration officer whose testimony is here and which your Honor will recall vividly—in fact, your Honor made answer, in the course of argument with counsel—you answered as I would make answer to your Honor with respect to those points.

Now let us analyze it for a moment.

Huggins was called to identify a document, which [60] is 25-A, which was a card on which was written the word "Deported". "Deported", may I say, according to the dictionary, doesn't mean only deportation pursuant to a legal process. Indeed, deportation pursuant to that type of legal process is rather new in the history of civilization, and in dealings between countries the process of extradition and deportation is the right of the United States to demand from a friendly government that a person be brought back. But there is nothing in the world to stop a government from allowing a person to enter in the first place, and there are various methods of excluding or ejecting or deporting persons within a country. That is true, your Honor, in this country. There are several methods of deportation, and it is not the alternative of legal deportation, which I have heard counsel use, or kidnapping on the other side.

The Mexican Government, I submit, has a perfect right to eject summarily a person there who is either disobeying its law or suspected of disobeying its law, and indeed it need not await the call of a friendly government against whom the accused is suspected of having committed treason for the normal, legal treaty-provided method of deportation. If it is the wish of the Mexican Government or the Mexican police to summarily [61] to eject an American citizen, it is their privilege to do it.

Colloquy

The Court: Well the query is, does it alter the judgment or the prosecution if an agent of the government is the demanding party or the party with whom the Mexican Government cooperates in the ejection of the defendant?

Mr. Williams: Well, assuming, your Honor—I would like to answer that directly, your Honor, although I was coming to it later.

Assuming all the allegations of fact—not the conclusions which they draw but the allegations of essential fact that here was a man arrested by the Mexican Security Police in Mexico City while he was peaceably and lawfully staying there, pursuant to a voluntary departure from the United States, a tourist card in his possession—assuming that the charge made by the Mexican Security Police against him was invalid, assuming that the FBI was waiting for him at the border, and indeed had stimulated the activity of the Mexican Security Police—there I say, your Honor, there is no deprivation of jurisdiction of this court, the man was properly before the court and properly tried.

My authority for that, your Honor, is no less [62] than the Supreme Court of the United States which in 1886 enunciated the doctrine that where a man had been kidnapped, arrested in Peru by an agent, a messenger sent by the President of the United States, who did have a warrant for his arrest, pursuant to an extradition request, but he ignored that, he went in and grabbed this man and brought him back to the United States, in California, and then from California he was taken to Illinois and tried in Illinois. This is the case of Ker vs. State of Illinois. The case went up to the United States Supreme Court and the court said it matters not how this man was arrested or how his rights were violated in Peru, or how he was brought into the United States; the fact is that the Illinois court had jurisdiction; the fact is that the defendant is before the court, and the fact is that he had a proper trial and he was convicted.

That same doctrine, your Honor, was enunciated again in the case of Frisbie vs. Collins, which was decided after this very Sobell case came before the Court of Appeals, and it appears there only as a footnote to the opinion written by Judge Frank, because the opinion obviously was written first; but then the case came down and Judge Frank appended it as a footnote, although he [63] decided it—he said he did not have to decide it on the basis of Ker vs. Illinois, he decided it on other grounds, but he put it in there—the Frisbie case—showing that the Supreme Court had never varied in the 70 years from the Ker case to the Frisbie case, it never varied the doctrine that it matters not how a man is brought before the court.

The Court: All right, let us get back to the proposition that they urge, and that is, that there was perjury.

Now based on the record, their contention is that the deportation which was connoted by Exhibit 25, and the significance of Huggins' testimony was that there was legal deportation—do you agree with that, do you disagree with it, and if so, will you give me your reasons?

Mr. Williams: I disagree with it, your Honor. I say that searching this entire record on Huggins' testimony and the card, there is absolutely not one false statement made by the witness Huggins on the stand.

Not only that, but Huggins was examined as to how he came to write "Deported" on there.

He presented no document pretending to be an order of deportation from Mexico. He didn't say that there were Mexican immigration authorities who brought [64] him there. There was no offer by the United States of a demand for the extradition of this man. There was absolutely no false statement by Huggins and no pretense that he was ever—that anything had happened other than that he was brought to Huggins across the border by the Mexican Security Police and handed over to Huggins who was there, that the FBI was waiting for him.

Colloquy

Counsel knew this, cross-examined h..n on that theory, and if your Honor wants me to I can read that cross-examination, but I think it is unnecessary because I have scrutinized every single word that Huggins has said with respect to that card, which, as your Honor says, can rise no higher than his testimony, and the word "Deported", I submit, is apt. Do you think Huggins would write "Kidnapped by the Mexican Security Police"?

Would he write "Thrown over the border"?

Or would he write possibly "Ejected". But "Deported" is the proper word.

As I told your Honor, if you will look in the dictionary, if you read the law on the subject, "Deported" is as equally apt an expression for what happened as "Deported" pursuant to a treaty provision.

The Court: Is there sufficient in the record from which I can conclude—and that is the issue here, [65] because the defense urges a hearing—is there sufficient in the record from which I can conclude that everybody understood "deported" there to mean the type of deported that you are talking about, to wit, ejected?

Therefore I address to your attention this:

No. 1, did counsel for the defense so understand it? Do you believe the record so shows it?

No. 2, is it likely that the defendant himself so understood?

No. 3, did everybody present so understand?

Mr. Williams: Your Honor, everybody did so understand.

I would like to say, first of all, it appears in the summation, and it appears particularly in the argument on the motion in arrest of judgment. The following appears: "There are all kinds of interests"—and this is Mr. Phillips saying this—"There are all kinds of interests, and the Government's interest in this case to get Sobell by force, by abduction, by kidnapping, with the cooperation of the

Mexican authorities; the United States on one side and the Mexican authorities on the other side, with constant telephone calls between them, with the proof is her."—

And then the court interrupts: "Mr. Phillips, [66] the jury has spoken."

There is no doubt, your Honor, based on—

The Court: Well, on the record, I am just reading here in Mr. Kuntz's summation—in the first place I have the printed record, page 1504, and Mr. Kuntz is saying:

"If that is a conspiracy, to take a visa from the Mexican Consulate, get on their airplane in their own name; take an apartment in their own name, stay there, I tell you, if that is concealment, you can have it."

And then he goes on in the matter of deportation, and this is important on the question of whether they knew the significance of the word "deportation". "The important thing I am getting at"—

This is on page 1505—

"—is, look at that notation at the bottom, in Huggins' handwriting, 'Deported from Mexico', 'Deported from Mexico.' I thought maybe there was something to that, and I questioned him. Now, wait a second, just wait a second. Mexico, you know, is a civilized country. Mexico has a government; it has courts; it has immigration officials; it has the same kind of people and the same kind of institutions that we have. Do we deport anybody or prove deportation by having Mr. Saypol get on the stand [67] and says, 'From my observation he was deported from Mexico'?

"Now, I didn't use those words. Huggins used the words. And that was another thing that I made sure of this morning; that was another thing I made sure this morning when I stayed outside; I wanted to look through some of his testimony. Is that the way anybody proves deportation? And Mr. Huggins sits there and says, from his observation he was deported;" and so on and so on.

Now, therefore, I ask you once again, Mr. Williams, was there any question in this record but that everybody understood "deportation" to mean here not a lega deportation in the sense that this matter had gone through the courts of Mexico, but that he had not come back voluntarily, which indeed was the issue involved?

Mr. Williams: Your Honor, I am absolutely convinced that based on what your Honor has said and what your Honor has read—indeed what counsel has said, if I don't misunderstand him—he says that the day after Sobell had been forcefully ejected from Mexico over the border, they had a telephone call from the Mexican authorities saying that he had not been legally deported, which means pursuant to legal process.

In other words, based on the admission of counsel [68] today, he says that he knew one day after Sobell was deported from Mexico that it was not pursuant to a legal process but by Mexican police.

The Court: I don't think he said he knew it the next day. He says the government—

Mr. Williams: Oh, the government. Now if there had been the slightest doubt in anyone's mind, Huggins was still there for cross-examination. Indeed, he was cross-examined for some 51 pages and it was perfectly—counsel was perfectly satisfied, apparently, with the answers he got, because he could have said, "Well, where is the order of deportation? Where was the demand by the United States to have the man deported? Do you have anything like that?"

"Does your record show anything other than that this man was physically ejected from Mexico by the Security Police?"

That is what was established on the trial, and I say, your Honor, every single word of Huggins' testimony is true.

Now I am not saying that he could not have been examined further. I am saying that counsel had an opportunity to examine further, but this 2255 motion is based on this charge, which, I say, is entirely [69] unsubstantiated and which, indeed, is loosely made; that the witness committed perjury on the stand and the United States Attorney knew it.

Now that is all I have to say on that particular point, your Honor, because I think that is all that can be said. And you could call all the witnesses in the world and there wouldn't be any further help to the court because this has to be viewed objectively. It is not a question of what was in Mr. Saypol's mind.

The Court: Is there anything you care to say about the charges that you suppressed the evidence consisting of the tourist card and the vaccination certificate?

Mr. Williams: Yes, your Honor, I am coming to the other two categories.

The Court: All right.

Mr. Williams: The second category, however, is not that. It is the claim that the United States Attorney misrepresented something to the court in the motion on arrest of judgment.

First of all, a motion in arrest of judgment while it conceivably could be misleading to the court, could obviously have no effect on the jury or the jury's verdict; that is, it could not have influenced the jury [70] in bringing in a verdict.

Now the statement which is attributed to Mr. Saypol is in answer to an argument by Mr. Phillips and Mr. Kuntz that when Sobell was arrested in Mexico City he had showed his visa to the Mexican Security Police, and Saypol immediately stood up and said, "Your Honor, there was no visa."

Now that was correct, there was no visa. There was a tourist card. I am sure that the United States Attorney

knew that there was a tourist card, and I am equally sure that the defendant knew that he had had a tourist card because he has said so, he has admitted it, he got the tourist card. Indeed, he could have demanded the tourist card from the United States authorities because he said in that affidavit that he had seen it turned over to the FBI by the Mexican Security Police at the border. So he knew there was a tourist card and he knew that he had a tourist card.

My point is, first, it had absolutely nothing to do with the trial, the fairness of the trial, which I submit was as fair a trial as any defendant could get in the United States, where I say with great pride that we have devised the most perfect system known to civilized man for obtaining justice and protecting the innocent.

[71] He could have demanded that tourist card if it meant anything to him at the trial and he could have offered it.

All the tourist card showed anyway is conceivably that he had left the United States voluntarily and was legally admitted into Mexico, but that was not an issue in the case. The United States never contended that he had not left the United States voluntarily.

Now with respect to the statement of a visa and a tourist card, there is a vast difference between a visa and a tourist card, though the immediate application here is not particularly obvious, and for certain purposes a visa is obviously on a passport, and a tourist card is not.

Now if the implication—if you say you have a visa, it obviously means you have a passport. Well, this man obviously did not have a passport; he had a tourist card. However, that is so unimportant and had so little effect either upon the court or the appellate courts, and obviously could have no effect on the jury.

The Court: Well, all of this gets back to the major premise, and that is, whether it was a legal deportation

or it was not a legal deportation, was he [72] going to come back to the United States voluntarily or involuntarily? In other words, the government was attempting to establish that he had taken flight. He left of his own free will and did not intend to come back.

The defense now is making the point apparently that by that proof, all of that proof, they were deprived of whatever opportunity they would have had to show that he was coming back to the United States voluntarily.

Therefore, I ask you this question: Whether it was a legal deportation or not a legal deportation as we know it, was there proof in this record which had to be refuted somehow or other that he had taken flight—whether it was the traveling throughout Mexico by aliases or not, even if we eliminated this issue of legal vs. illegal deportation, would there still have remained a substantial body of evidence unrefuted and still unrefuted today?

Mr. Williams: That he was attempting flight?

The Court: That is correct.

Mr. Williams: Yes.

The Court: The query I am getting at, if they are able to establish it was not a legal deportation, would it have removed completely the question of flight [73] from consideration by the jury?

Mr. Williams: No, your Honor, I say of course not. Even if they had removed the question—suppose he had come back voluntarily. Suppose there had been—I don't like to say a legal deportation because that assumes that the method used was not a legal deportation. I say both methods were legal at the option of the Mexican authorities. But I say that assuming that there was not a treaty-providing deportation, that the evidence of flight was still admissible and still so substantial that the jury could have taken that into consideration in finding a verdict of guilty.

Now there are other things—we are really on the third point now—that is the suppression of evidence. At the

very time of the trial, before the jury's verdict had come in, counsel then representing Sobell had copies of the airline tickets and the manifest which they could have offered had they wanted further to show voluntary departure from the United States. They did not do it.

If your Honor will notice the dates—I think it is March the 27th or 28th—that is the date on which the certificate was affixed to the photostatic copies of the airline tickets, which would have proved [74] that this man in his own name had left the United States voluntarily. They did not introduce it.

Likewise there is available, which they have never referred to, the fact that the return trip tickets had been cashed by both Mr. Sobell and Mrs. Sobell, and the only ticket that had a return trip ticket which was not cashed was that for their child.

There is a great deal of evidence, as your Honor knows, at every trial that is never introduced in evidence, either by the government or by the defendant. You couldn't possibly put in evidence in a trial all of the evidence available. It would protract the trial. It would be duplicitous.

There are lots of reasons why evidence is not put in—not because there is any desire to obstruct justice or to mislead but either it doesn't prove anything or the fact has already been abundantly proved.

In this case there was no contest. The government had never claimed that this man did not leave the United States voluntarily, so that there can be no claim of any particular validity, in my opinion here, such as to ground a demand for a new trial, or what they would like to have: A trial of Saypol and Cohn on this issue—absolutely no basis for it, because something [75] was called a tourist card—there was a tourist card which they knew about, and could have introduced, could have demanded it under Rule 16, but did not; a vaccination certificate, which proves absolutely nothing, which is just as consistent with a fellow wanting

to get into France as is into Mexico and back again to the United States. It has no probative value at all.

Now those are the two bits of evidence which they claim the United States suppressed, both of which the defendant knew about and which, as your Honor said, how can you possibly base a claim of suppression of evidence on something that you yourself knew about and never asked for—indeed, never even cross-examined about.

So I would like to conclude, your Honor, the first part of my argument relating to the claim of the knowing use of perjurious testimony and the making of false representations to the court, and the suppression of evidence.

Now I would like to say here that my second point will be that all of these points are not new. Indeed, every one of these points was made either to the District Court—and I believe to the District Court on the motion in arrest of judgment, or were made before the Court of Appeals and the Supreme Court of the United States.

[76] Now let us take a look at their brief, which is Exhibit A to my answering affidavit on the second motion.

Point V of their brief in the Court of Appeals starts off with a headnote: "The United States and hence the court below had no jurisdiction of the person of Sobell since he was forcibly seized in another country by or at the instance of the FBI and the court below should have directed a hearing on this issue"—which means that they made the point below, and your Honor refused to direct the hearing on this issue, or they did it on a 2255—

The Court: No, this is a motion in arrest of judgment.

Mr. Williams: Yes, this is a motion in arrest of judgment, and your Honor can read that. As I say, a photostatic copy is attached to the motion papers.

This is the central point they made in the case, that the man was kidnapped in Mexico, that he was forcibly ejected from Mexico, that as a result this court lacked personal jurisdiction to try this man. Now I needn't repeat the argu-

ment which your Honor has referred to, and Judge Frank's answer to that, and the fact that this court as well as the Court of Appeals passed on it.

[77] My only point in referring to it at all is that it is not novel, it is not a new point, there is nothing new about this entire application; but, your Honor, even further, when they went to the Supreme Court of the United States, point VI of their petition for certiorari reads: "kidnapping" and "motion in arrest", so clearly they put before the Supreme Court of the United States on a petition of this character the allegation, the charge that this man was kidnapped in Mexico and was brought back in connivance with the FBI or the Mexican Security Police acting as agents for the FBI in Mexico, and both the Court of Appeals refused to reverse the conviction on that ground and the Supreme Court of the United States obviously decided to adhere to Ker vs. Illinois and the Frisbie case.

So I say, your Honor, there is nothing novel about it, and in my opinion and judgment the motion should be denied, no petition for a rehearing should be granted.

The Court: Are you through?

Mr. Williams: If you will just give me a moment, your Honor.

(Mr. Williams examines.)

Mr. Williams: Your Honor, I think that [78] concludes this part of it.

The Court: I will hear the other motion.

Mr. Perlin: Your Honor, may I have a few moments?

The Court: Yes, go ahead.

Mr. Perlin: I beg pardon?

The Court: Yes, go ahead.

Mr. Perlin: Your Honor, I would like to allude to the fact that our motion basically asks for a hearing to establish these facts. We are entitled under the law prevailing of 2255 to a hearing, unless the record conclusively shows—

The Court: I know that.

Mr. Perlin: --the absence of—

The Court: I am familiar with it.

Mr. Perlin: In the light of this, your Honor has asked a probing and significant question.

The Court: Pardon?

Mr. Perlin: Your Honor asked a probing and significant question of Mr. Williams, and I would like to talk to that question. Could anyone have conceived that the government meant to establish legal deportation?

Well, your Honor, part of the record is the [79] Court of Appeals' decision. Three Judges of the Court of Appeals decided that is what it meant. Mr. Kilsheimer, who is here now, when he wrote his brief, did he intend to prove a legal deportation? It is evident, if you examine the brief, that he sought to do it throughout—.

The Court: Well, I am asking—and this isn't clear to me—what difference would it have made from the defense point of view, the point you are trying to establish—you are trying to establish is that he was coming back to this country voluntarily. Did it make any difference whether it was by legal deportation or by ejection?

Mr. Perlin: Well, two things: First of all it would have made a difference.

The Court: Why?

Mr. Perlin: Secondly—I will get to that.

Second, the other point I was going to go to, Mr. Williams imports the concept that this was done by any authorities of the Government of Mexico—while it might not have been deportation, it was ejection, expulsion, but the authorities decided to get rid of Mr. Sobell.

Well, sir, we say that is not so in our petition, that that is not true, because nobody in Mexican [80] governmental authority did it, consented to it or knew about it. The Mexican secret police, which is a local police, were acting as agents of the FBI, and if he says there was consent

of the Government of Mexico or any of its authorities, sir, we have an issue of fact. We have an issue of fact that can only be determined in the course of a hearing.

Now, your Honor, the fact that, as Mr. Williams says, he was put out by the authorities meant they determined they didn't want him for something that he did there or something that he did in the United States is of major significance.

Finally, I would like to allude to this point—you talked in your colloquy with Mr. Williams about other evidence of flight. I should like to read this one excerpt from Goggins vs. O'Brien. It says: "The burden is not on the petitioner to show a probability that in the jury's deliberation the perjured evidence tipped the scales in favor of conviction. If the prosecutor is not content to rest on the untainted evidence and chooses to button up the case by knowing use of perjured testimony, an ensuing conviction cannot stand, and there is no occasion to speculate upon what the jury would have done without the perjured testimony before it."

[81] And finally, your Honor, I say on the face of the record and the government's replies, neither the court can say conclusively, nor the prosecution, nor the government now say conclusively that the jury did not possibly consider it. We don't even have to show that but it cannot be conclusively said that the jury did not consider it.

The Court: I get back to my original premise, which I would like to have answered. Judge Frank stated that in his opinion that Sobell's forced return to the United States was certainly relevant to the government's theory that he had fled to Mexico to escape prosecution, or otherwise the jury might have inferred that he had returned voluntarily to stand trial. All the government, he says here, was attempting to establish was that it was a forced return—

Mr. Perlin: Against his will.

The Court: And you don't disagree with that. You agree with that. It was a forced return, whether it was a forced return by reason of the Mexic n police acting at the behest of the FBI or whether it was because they were acting through official channels, it was a forced return.

Mr. Perlin: Let me say this, your Honor: [82] It was not in this sense—he wanted to, would have returned to the United States. He was physically picked up and given no opportunity to express an intention or lack of intention—

The Court: I understand—

Mr. Perlin: If I may finish, your Honor. There the Court of Appeals says it is highly relevant. Mr. Williams in his argument says today—today he says that inferred that he originally fled to Mexico for illegal purposes, for guilty motive—the whole question of unwilling return. It was a misrepresentation importing if there was a legal deportation, he would have had an opportunity to return voluntarily—

The Court: But you will have facing you the fact that the government was attempting to establish that it was a forced return—that is the relevancy of it. Therefore they were attempting to eliminate from the jury's consideration the question of the voluntary factor of his return.

You, sitting there in possession of evidence that indicated that it was indeed forced, in the sense that he was kidnapped and abducted and would have come in voluntarily, did you not have some obligation, your lawyers, your associate counsel, to come forward with [83] that evidence, to make an issue of that?

Mr. Perlin: No, let me answer that question head on, your Honor.

First of all, it is true the government sought to prove that. But they proved it with perjured testimony, that they knew was perjured and they used it knowing it was false, No. 1.

No. 2, while we could have litigated the question possibly as to the circumstances of his departure, we could not have litigated that the government knowingly used testimony that was false.

The Court: What difference would it have made at that point, whether it was knowing or not. You could have litigated perjury.

Mr. Perlin: No, your Honor, it makes a qualitative difference. And perhaps your Honor recalls better than I do the decision of the Supreme Court and all the courts, when a prosecution has to use false evidence, and that they knew to be false, that destroys the proceeding.

The Court: Does it excuse the conduct on the part of the defense where they sit back and know it is false and do not come forward during the course of the trial?

[84] Mr. Perlin: Your Honor, the defense needs no excuse when the prosecution knowingly uses perjured testimony, and they cannot prove that it did it knowingly.

The Court: But the defense did not know it at that time, you say—

Mr. Perlin: That is right.

The Court: Therefore you had no obligation to come forward.

Mr. Perlin: They did not know that they had knowingly used perjury.

The Court: That is right. They knew it was perjured but they did not know about the "knowingly", therefore they had an obligation to come forward.

Mr. Perlin: Your Honor, you are saying that the government can blithely go around using false and corrupt testimony—

The Court: I am not saying that at all.

Mr. Perlin: Let me finish—but if the defense doesn't contest that perjured or corrupt evidence, then you cannot do anything about it.

The Court: I am not saying that at the moment. What I am saying is that you sit at counsel table and you know that perjury is being committed, whether the government is a conspirator with the perjurer or not, but [85] you know that perjury is being committed, can you sit back and permit that perjury to go to the jury unchallenged, then come back and show perjury?

Mr. Perlin: A—yes.

B—they did not know that Mr. Obregon of the Mexican Government had advised Mr. Huggins and Mr. Saypol that he was not deported. They did not know that.

The Court: You are addressing yourself to the "knowing" part.

Mr. Perlin: Of course—that is the heart of this case.

The Court: He knew he had been abducted, he knew he had been kidnapped, didn't he?

Mr. Perlin: It is irrelevant, your Honor—completely irrelevant.

The Court: All right.

Mr. Perlin: He did not know that the—

The Court: I am glad to have you argue this point.

Mr. Williams: Your Honor, may I—

Mr. Perlin: I have one other thing.

Mr. Williams: All right, I am sorry.

Mr. Perlin: Now the tourist card, I just allude to the fact that Mr. Williams says that "if you had [86] asked for the tourist card, which was seized prior—you would get it—your Honor, we asked for all the material unlawfully seized from my client, and I have never gotten it, including the tourist card.

Mr. Williams: Do you want to move the court for it and we will argue it?

Mr. Perlin: Well, I just wanted to bring it to your attention.

Mr. Williams: The point is, your Honor—

The Court: We have enough before the court now.

Mr. Williams: The point is they did not move for it at the time of the trial or before the trial. Sobell knew that it was there, he could have had it—at least he could have moved for it, and as far as the government is concerned, I am sure it would have been made available to counsel by the court, so there isn't any reason but that the tourist card was available.

Now I am a little tired of hearing the shouted charge of perjured testimony. In the first place, I have said that there was no perjured testimony. This card which was presented was something which had actually been written at the time, done at Laredo, long before the trial and before the government had called for it. [87] It was not fabricated. It was what an inspector had written, which he thought was an apt description of what had happened, and it was brought up exactly as he wrote it at that time. There was nothing false or perjurious or fabricated about it at all—and he answered all the questions honestly and directly, and counsel had an opportunity to examine him even further, as I have said, and they did not do so.

Now as your Honor pointed out, there was ample evidence to sustain the claim of flight which the United States was making. Even though Sobell may now say that he would like to have had a chance to come back to the United States voluntarily—I suppose every prisoner, everyone who is finally not extradited from a foreign country would like to make the same claim. Sobell, however, in an affidavit in support of a motion—the affidavit is dated September 23, 1953—it was submitted in support of a motion in opposition to the motion of the United States Attorney, to cause to be summarily affirmed the decision of June 8, 1953, in which Sobell was denied a new trial on the ground of newly discovered evidence under Section 2255.

This is what Sobell says which clearly shows that he contemplated at one time, anyway, flight from [88] Mexico.

He says this "Then and only then was it that I left the family in the Mexico City apartment and traveled around Mexico, to Vera Cruz and Tampico, even using false names and inquiring about passage to Europe or South America for all of us:"

He says, "It is hard to understand how I might have been allowed to do such a stupid thing but it did not take long for me to recognize how inept and pointless it was. Of course I had no idea how it could be misinterpreted and how dangerous it would turn out to be."

So that there is no doubt, your Honor, even on his own admission, he did contemplate flight, and it was up to the jury in the face of all the evidence which was before it, none of which was perjurious, whether they could believe that this man did contemplate flight and the fact that he was forcibly brought back to the United States, whether pursuant to the terms of an extradition treaty or whether he was thrown out by a branch of the Mexican Government —and there is no denying that the Mexican Secret Police or Security Police are an arm of the authorities of the Mexican Government—whether it was pursuant to treaty or by forceful ejection, the fact is that he did not come back to the United States voluntarily.

[89] The Court: All right. Mr. Kinoy, how long will you be in your argument? Or would you prefer we take a recess now or later?

Mr. Kinoy: I think it will be approximately an hour.

The Court: An hour?

Mr. Kinoy: Yes.

The Court: Then we will take a recess now.

(Short recess.)

Mr. Kinoy: May it please the Court, we turn our attention now to the second motion under Section 2255—the motion related to the jurisdiction of the court over the subject matter.

Colloquy

With the Court's permission, I will address myself first to the governing law; secondly, the applicable facts; and, third, the impact of the prior litigation upon the availability of the present challenge.

This motion under Section 2255 is, I suggest to the Court, governed and determined by the decision of the Supreme Court in Cook vs. United States, 288 U. S. 102.

In this case Justice Brandeis developed for the court and found a rule of jurisdictional law which determines the present proceeding.

In this opinion Justice Brandeis developed [90] the concept that the United States lacks any power—any power whatsoever—to prosecute proceedings based upon extra-territorial action in violation of a treaty.

Secondly, that this question is one which goes to jurisdiction over the subject matter, and, third, that this objection cannot be waived by any of the normal methods of waiver, by general appearance, or by answer on the merits.

Now I suggest—

The Court: Let me ask you this: First I want to ask you, Mr. Kinoy, would you rather not be interrupted?

Mr. Kinoy: Now, I would just as soon hear the question, your Honor, and if I can answer them directly I will so answer them.

The Court: Wasn't the Cook case argued in the Circuit Court and wasn't it in your brief in the Circuit Court?

Mr. Kinoy: Well, that is extremely interesting. Yes, it was in the Circuit Court—it was in the brief in the Circuit Court, but the point which was raised in the Circuit Court was the issue of personal jurisdiction, whereas the Cook case relates to a treaty violation relating to the issues of subject matter jurisdiction. [91] The question which your Honor asks elucidates precisely the issue which is before your Honor at the present time.

The Court: One other question—

Mr. Kinoy: Yes, your Honor?

The Court: —didn't Judge Frank say that there was no question in this case about the jurisdiction over the subject matter?

Mr. Kinoy: Exactly right, your Honor, exactly right. The issue which we raise here at this time was not raised to Judge Frank. We raise it de novo.

Now I suggest to your Honor that the facts in the Cook case, are very simply stated, in examining its application to the present situation—I am sure your Honor recalls that in the Cook case, by treaty with England, the United States had the right to board and search English ships extraterritorially, with a proviso that this could not be done at a greater distance than a ship could travel in a period of an hour.

The second operative fact was that the United States agents violated the treaty, seized the ship and found unmanifested liquor.

Thirdly, proceeding in the Federal Court against the master by libels and against the ship and cargo, they instituted Federal proceedings.

[92] Your Honor will then recall that the defendant answered to the merits—and subsequently, following that, relying upon the treaty, challenged the subject matter jurisdiction of the court.

Now I find it extremely interesting, your Honor, that Justice Brandeis outlines the arguments raised by the government in the Supreme Court, in opposition to this contention in such a manner as to raise interesting questions in relation to the arguments raised by Mr. Williams here today.

What did the government argue there? First, that a prior wrongful seizure is immaterial, because of the subsequent presence of the defendant in the court.

Secondly, that proper judicial proceedings validated prior acts of the United States agents: and, third, in any

event, the answer to the merits waived the objection to the jurisdiction.

Justice Brandeis rejected these three arguments as misconceptions—and I stress that word—misconceptions, because I think that fundamentally the answer of the government to our motion is based upon a jurisdictional misconception.

Justice Brandeis, in very pointed language, rejected these arguments, and I call it to your Honor's [93] attention—the words are extremely interesting, and I quote: "The objection is"—I am sorry—"The objection to the seizure is not that it was wrongful merely because made by one upon whom the government had not conferred the authority to seize at the place where the seizure was made. The objection is that the government itself lacked power to seize, since by the treaty it had imposed a territorial limitation upon its own authority • • • Our government, lacking power to seize, lacked power"—

And I stress this to your Honor—"because of the treaty, to subject the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the treaty."

Now, your Honor, I suggest that we must examine the fundamental theory of law underlying the decision in Cook. Justice Brandeis develops the following concepts: In the first instance, that by treaty, a solemn contract between two sovereign nations, the United States has a limited and circumscribed power, its national power—

The Court: Wasn't the distinction there and didn't the court point out the distinction that in the Cook case you did not have an offense committed within [94] the territorial jurisdiction of the United States? It is obvious, therefore, it was only because of the treaty that the American authorities were permitted to board a British ship, if that ship was within one hour of sailing time of the United States territorial waters.

Colloquy

Didn't the court point out the distinction there between that type of case—and I refer you to page 122—the case differs from the Richmond and the Marino, where forfeitures of vessels wrongfully seized by our Navy were upheld. There the vessels seized were of American registry and the seizures did not violate any treaty, but were merely violations of the law of nations because made within the territory of another sovereign. In this case it was held that the illegality of the seizures did not affect the venue of the actions or the process of the court.

Therefore, if they make that distinction, is there not a distinction here in that the alleged crime was committed within the jurisdiction of the United States—there is no question about that, is there?

Mr. Kinoy: I think, your Honor, that there is a very simple and direct answer to that.

The Court: Well, wait a minute. Hear me out for a moment.

[95] Is there any question here but for the fact that Mr. Sobell was apprehended in Mexico—but for that fact, is there any question about the fact that this court could legally have jurisdiction in this district?

Mr. Kinoy: That is precisely the question.

The Court: Is the answer yes or no?

Mr. Kinoy: It cannot be answered that way. Why? Because the operation of the treaty between the sovereign nations here involved—

The Court: You are not answering my question.

Mr. Kinoy: I am trying to.

The Court: I am asking you to assume that he had not taken flight.

Mr. Kinoy: Yes.

The Court: Can you, upon that assumption, answer my question as to whether or not there would have been

any question, if he had been apprehended here, could he have been tried in this district?

Mr. Kinoy: Oh, of course, we don't raise that question at all.

The Court: The answer is "Yes".

Mr. Kinoy: The answer is "Yes".

The Court: Therefore there is no question about the jurisdiction of the subject matter. The only [96] question that you now say raises the subject matter is the violation of the treaty.

Mr. Kinoy: That is precisely right, your Honor, because what the violation of the treaty does is raise a fundamental question of sovereign power.

The Court: Then don't we get back to the question that it isn't jurisdiction over the subject matter but jurisdiction of the person?

Mr. Kinoy: No, that is not so, your Honor—and if you will permit me to develop what I think I can demonstrate to your satisfaction—this precise type of question is deemed to be and must be considered in law and in logic as a question going to the total powers of the court—a question considered to be a question of jurisdiction over the subject matter, and I will point out to your Honor why.

It is in the very Cook case that your Honor related, that Justice Brandeis develops the concept that the total jurisdiction of American courts derive their powers, fundamental power from the United States itself. These powers are similarly limited and circumscribed by the operation of sovereign treaty. Accordingly, where a governing treaty is violated, there is no national power to proceed, there is no power in the sovereign to proceed. There is [97] no power in the domestic courts to proceed, and that, accordingly, since this is not—and I suggest to your Honor this is a fundamental question—since this is not an issue of personal rights, but a question of sovereign power, it is not and cannot, and for that matter is never waived by an individual.

Colloquy

Now I suggest to your Honor that the fundamental theory, the philosophy, the rule of law laid down in Cook, is elucidated by an examination of a prior case which, significantly, Justice Brandeis cites and relies on—United States vs. Rauscher, 119 U. S. 407—an extremely interesting case—an opinion by Justice Miller, 1886. In this case the operative, salient facts were these: The defendant was extradited from England on a charge of murder, properly extradited according to the provision of the extradition treaty. He was tried in the United States for an offense not listed in the treaty of extradition. He was tried for the offense of cruel and unusual punishment.

On a motion in arrest of judgment, the issue of total lack of jurisdiction in the court was raised by the defendant, and on appeal to the Supreme Court, the court upheld the defendant, holding as follows: That a United States domestic court cannot exercise jurisdiction [98] in violation of treaty. And why? Because this is an issue of jurisdiction of the person? No. Because the treaty, by solemn compact between the nations, excludes from the competency of the court a trial of a defendant on an offense not included in the treaty.

Now it is extremely interesting, he could have been tried in the Southern District of New York on the charge of cruel and unusual punishment. Of course he could have—it was an offense committed under the laws of the United States. The court had jurisdiction over that offense but they did not have jurisdiction over that offense in the instance of a treaty violation.

Why? Because by solemn agreement between the sovereign nations, the United States and Great Britain, in this instance, voluntarily gave up internal domestic jurisdiction over certain offenses, crimes and occurrences.

The Court: Do you think that is the effect of a treaty, or is it rather that they get something that they wouldn't

have had otherwise? In otherwise, the right to get him back, instead of voluntarily giving him up.

Mr. Kinoy: Well, it is very interesting, your Honor, what you have just done—if I may use a simple analogy, in the law of contract, given one side of [99] the promise—yes, a treaty of extradition is a high contract, a promise between nations. What is the price? There is no right in international law to obtain extraterritorially a national in another country—no right. That would be an infringement of sovereignty.

In exchange for giving up the absolute nature of this right, one sovereign, in exchange for that, in exchange for the promise that they will deliver individuals, they obtain from the other sovereign the promise that their domestic competence will be limited in certain ways.

The Court: Is not the exchange in return, that the other sovereign nation will have the right to get certain of its nationals back upon a showing of a violation of one of its laws?

Mr. Kinoy: What I suggest to your Honor is that the very nature of the extradition contract illustrates, as I will point out both in Rauscher and in the other government cases, that precisely because one sovereign gives up this absolute right to hold and promises to deliver, the other sovereign is bound to adhere to the promises and terms of the extradition treaty. And what are the terms of the extradition treaty?

One, certain very important inflexible [100] procedures must be followed. There are only certain ways you can operate. You can only do it on demand—your Honor is aware of the circumstances. You can only be tried for certain limited offenses. For instance, take the Rauscher situation, your Honor—and I think that is the clearest possible example of why the domestic competence of a local court is affected by—and that is the meaning of the Supreme Court decision—is affected by the treaty promise.

You could try Rauscher here in the Southern District

of New York—no problem about that. You could have tried Rauscher for cruel and inhuman punishment. Rauscher was brought here through the proper processes of the extradition treaty but the treaty provided that only certain offenses were extraditable, and the promise that the United States Government gave—a highly solemn promise, which the Supreme Court—it is very interesting—the Supreme Court says that the exercise of jurisdiction in violation of the treaty would violate the purpose of the treaty—and then I would like to call this to your Honor's attention—"violate the sovereignty of the contracting parties".

What was the Supreme Court doing in Rauscher? Was it enforcing a personal right of Rauscher? No, it [101] was not. It was enforcing the high obligation of the contracting parties to adhere to their bargain.

Now I suggest to your Honor that the law in Cook and Rauscher is clear—the heart of the jurisdictional question which we here pose to your Honor is the issue of a violation of a governing treaty, and I suggest to your Honor that that is a decisive and determinative question. Why?

The petition presently before your Honor alleges in the greatest of detail a gross and complete violation of a governing treaty, and in this respect I think it is important, and I call your Honor's attention to the fact that the allegations—and for the purpose of my argument I will proceed on this assumption—that the allegations have not been denied by the government, and they will be deemed factually true.

The central and governing document which your Honor must consider is the extradition treaty of 1899, 31 Statutes at Large, 1880—a treaty entered into between the United States and the United States of Mexico—we set forth for your Honor's convenience the salient provisions of the treaty in our brief.

Now what are the basic operative facts which we have alleged in this petition, showing a treaty [102] violation—

a treaty violation which deprived the trial court of total absolute national power to proceed, of competence?

First, we charge in the petition, the complete and absolute violation of every procedure prescribed by the treaty in order to proceed extraterritorially, by the United States and its agents—a violation by the United States and its agents of the very carefully spelled out procedures, setting forth the manner in which an individual can be obtained extraterritorially by the Government of the United States under the treaty.

I won't take the time, your Honor, to outline the facts. Your Honor, of course, is aware of it, and we don't think that the government contends that these steps were followed in this case.

I will, however, call your Honor's attention to a very interesting fact which, without developing it at all, throws some light on the previous colloquy between court and counsel.

The treaty then provides that after the five steps set forth in the treaty, the extradition warrant and the method of proceeding—the question as to whether or not the individual sought shall be extradited or permitted to leave voluntarily, or to do anything, shall [103] be governed by Mexican law; that the procedures provided in Mexican law shall then govern the adjudication of the question of what shall happen to the extradited individual.

For your Honor's convenience we have set forth these in our brief also, and naturally the government does not suggest here that these procedures were followed.

What do we have instead? Instead of following these procedures, which every United States Attorney, every United States official, as well as every officer of the court is aware of—that is the method by which you proceed in a situation like this—the United States through its agents—and these are the allegations of the petition which we will deem to be true for the purpose of the argument—fully

aware of the obligation of the treaty, instigated, arranged and participated—

The Court: Well, I get your point.

Mr. Kinoy: I am sure that is clear.

The Court: Your point is that this is a matter that goes to the jurisdiction of the subject matter, and you claim that it is a violation of the treaty, therefore this court was deprived of jurisdiction in the first instance, and furthermore, since it is not a question of jurisdiction over the person, it is never waived.

Mr. Kinoy: Precisely, your Honor.

[104] Now there is a second and very important violation of the treaty which I think is essential to call to your Honor's attention. There is a violation of Article 2 and Article 7 of the treaty—your Honor is familiar with the Mexican Extradition Treaty. I won't take time to develop this but merely to point this out: Petitioner was here tried and convicted for an offense not subject to extradition.

Now that is an extremely important, and I suggest a serious question for the court to consider. The offense for which petitioner was charged, a conspiracy to commit espionage—as well as espionage itself—was totally removed from the competency of the domestic court by operation of the treaty. It is not one of the offenses listed in Article 2. The petitioner could not have been extradited under Article 2 of the treaty. And the court, because of the violation of the treaty, was totally deprived of competence and jurisdiction to proceed.

The Court: Let me ask you, what about your argument that by the listing of those offenses, the government was giving up a right? Now if that was not an offense listed, was the government giving up any right?

Mr. Kinoy: Oh, the government, absolutely, your Honor, agreed with Mexico in 1899, in entering into [105] the treaty, that it would only proceed in a certain way to obtain extraterritorially an individual. It gave that promise.

The Court: Well, I am seeking information. I do not challenge it.

Mr. Kinoy: Yes.

The Court: Was it only with respect to the crimes listed?

Mr. Kinoy: Well, two ways: First with respect to the crimes listed, absolutely right; and, second, if I understand your Honor's question, the promise is not only in respect to the offenses listed but—

The Court: That is all I am getting at.

Mr. Kinoy: No, of course not. The promise is with respect to any type of extraterritorial demand. The agreement is that there will be no attempt where the offenses are not listed in the treaty, except in certain other ways which I will point out to your Honor. But there are provisions—there are ways in which the question could have been raised in the Mexican Government. I am not suggesting that there aren't ways it couldn't be raised—I am asking your Honor to consider this because I think your Honor sees the impact of the argument. Article 7 of the extradition treaty also provides that [106] in any event an individual may not be tried, the competence of the court—it is very interesting, the language of jurisdiction which is used in the extradition treaty itself—the court may not try, says the extradition treaty, an individual for either—and this is extremely interesting—a political offense or on account of an act connected with such a political crime or offense, and of course I don't have to discuss with your Honor—your Honor is very well aware of the fact that the use of certain political affiliations in the trial were shown as proof of motivation and intent. Those questions were involved in the trial. Thus I suggest to your Honor the offense for which petitioner was tried was specifically exempted from the jurisdiction of the domestic United States court by treaty action.

Thirdly, the third set of operative factors showing treaty violation is the charge, your Honor, and uncon-

tested by the government, although it would be simple to contest it, that there was no consent of the Mexican Government in any respect to these violations of the treaty.

More than that, that its objections to the actions of the United States Government were made fully known to the United States Government.

Now what does this show, your Honor, these three [107] full sets of operative facts—and I will allude again to their significance at a later point in the argument.

They show a charge—of an utterly lawless violation of a high sovereign treaty by the United States Government and its agents, unchallenged and uncontested, although it would be the simplest thing in the world to come in with an affidavit saying otherwise—well, in fact we believe, and the petition so alleges, that there was no such agreement, there never was any kind of consent of any kind by the Mexican Government.

Now I suggest to your Honor that the court is required to consider two legal consequences of this treaty violation—

The Court: Are you arguing this, Mr. Kinoy, that in every instance—forget this particular case—in every instance where the court would have had jurisdiction over the subject matter, if the defendant had been apprehended in this country but had flown the jurisdiction, that if that defendant then is brought back in violation of a treaty agreement between the United States and that foreign country, whether France, England or Mexico, that it is always a question of jurisdiction over the subject matter as distinguished from jurisdiction over the person?

[108] Mr. Kinoy: Yes, your Honor. That is what we argue—that is the law—and we suggest, both in this argument and fully in our brief, that this point is completely supportable and is governed completely by the principles and the concepts developed by Justice Brandeis in Cook, because, as your Honor puts it, it is correct. That is the position—

Colloquy

The Court: Is there any analogy between a defendant who flees the American jurisdiction and a defendant who leaves one day and goes to another state—and there is a question of extradition—is that a question always of jurisdiction over the person or over the subject matter?

Mr. Kinoy: Well, that is a searching question, your Honor, and it merely strengthens our contention. I was going to allude to it later in the argument but I will just mention in passing now that the interstate abduction cases which your Honor is referring to, both the old Georgia cases, Frisbie vs. Collins, referred to by Mr. Williams—very interesting in that they distinguish interstate abduction or rendition cases from cases involving violations of treaties between sovereign nations. Why? Because they point out that you do not have the questions of high international contract in the extradition treaty [109] but rather that the individual states of the union are governed by the supreme law of the land. The agreement to render back and forth, as I will point out to your Honor—this is very fully discussed by the Supreme Court in—I would suggest this case to your Honor, Lascelles vs. Georgia—it goes into it in great detail in making the analogy—the very point in the Cook case and in Rauscher is that it is the international treaty, setting up the obligations between the sovereign nations which deprived one court or another court of internal domestic jurisdiction. You do not have that in the states, because the states of the union are not sovereign nations. The states of the union are bound by the Supreme Court and the law of the land, and I think the Supreme Court cases are very clear in that respect.

Now since your Honor has raised this question, I would like at this point, because I think the conclusion of Cook and Rauscher to the present allegation in the petition is extremely clear. I would like to discuss for just one moment, without going into any detail, certain groups of

cases which have been referred to by Mr. Williams, which I think your Honor may be aware of and which are necessary to consider. Mr. Williams has raised the question that the decision of the Supreme Court in Ker vs. [110] Illinois, 119 U. S. 436, is determinative of the issue in support of the position of the government.

I would like to suggest this to your Honor: There are in this field, as your Honor is probably aware, three categories of cases which do not involve the Cook and the Rauscher situation. What are they? First, the cases involving international removal, which do not involve a treaty violation.

Second, cases involving international removal, pursuant to a special lawful agreement between the sovereign nations or what the authorities call an ad hoc agreement between governments.

And, third, cases involving interstate rendition. The Ker case, just cited by Mr. Williams, falls into the first category, and only because the government has placed so much emphasis on it, both in its reply affidavit, which we just received this morning, your Honor—

Incidentally, Mr. Williams, you referred to exhibits to the reply affidavit which we did not receive. If we could get copies of them, I would appreciate it, and I assume your Honor will give us an opportunity—

Mr. Williams: They are in your own brief.

Mr. Kinoy: Fine. You mentioned them and I was curious about what they are, only because it is [111] relied on in full in Mr. Williams' affidavit, but I think it is worth spending a few minutes on, your Honor.

The facts in the Ker case are extremely interesting, and I would like to outline them to your Honor.

In the Ker case, although an extradition warrant was issued by the United States, or the President at the request of the State of Illinois, a warrant was never presented to a foreign government, and the United States never pre-

sented it to a foreign government—and never participated in so presenting it. Why? And this is an extremely interesting fact—I am sure that Mr. Williams did not mean to imply that the individual obtaining possession of the defendant Ker in the foreign country—Peru—was an agent of the United States. Of course he was not. He was a Pinkerton detective, a private individual hired by the employer—the defendant had allegedly embezzled certain funds from the employer, but a very significant fact, a private individual, not an agent of the Government of the United States.

Now it is very interesting that at that time Peru was at war with Chile, and Chile, and the Chilean forces, under a General Patrick Lynch, had occupied substantial areas of Peru, including Lima, the place where Ker was—the defendant Ker. The Pinkerton detective applied to [112] General Lynch—the private individual applied to General Lynch, your Honor, for aid in seizing Ker. Lynch was the recognized government authority and consented to the seizure of Ker.

Now I suggest to your Honor those facts are extremely significant in understanding the reason why Ker has absolutely no application whatsoever to the present situation.

But more than that, sir, Ker did not challenge the jurisdiction of the court over the subject matter resulting from a treaty violation.

In the face of these facts—facts, incidentally, your Honor, which were fully brought to the Supreme Court by the Attorney General for the State of Illinois in the argument—and of course they are to be found in the records of the court. Ker raised only one issue—and this is significant in coming to certain of the other problems which must be considered on this motion. Ker only raised the issue that the forcible seizure violated his personal rights under the due process law. Now that is extremely significant.

What did the court hold? The court held that there was no treaty violation here, and that since—and I recall to your Honor that this is 1888—since this [113] was a review of State Court proceedings, the Supreme Court would not consider whether a forceful seizure was such a violation of due process as to overthrow the state determination. Your Honor, of course, was aware of the problems involved in due process considerations at that time by the Supreme Court.

Now I suggest to your Honor that the distinction between the Ker case and the present situation is obvious on its face. There was no treaty violation in Ker. Here the gravamen of the action—and it is correct and we stand on that—the gravamen of the action is the charge of treaty violation.

Secondly, there was no extradition treaty then in effect. There was no transgression of Peru's authority, but more important of all, there was actual consent of the governing authority to the seizure, and, finally, there was no United States Government action. Therefore, what flowed from that? There was no limitation on local United States domestic jurisdiction.

Now it is significant that Justice Brandeis recognized this distinction in Cook, and in deciding Cook he cites Rauscher but says Ker doesn't apply because Cook is a treaty violation case, Rauscher is a treaty violation case, and I suggest to your Honor that Sobell [114] is a treaty violation case.

Finally, I suggest to your Honor, Chief Justice Taft's distinction of Ker with Ford vs. The United States, 273 U. S. 593, in which the Chief Justice makes precisely the same point as Justice Brandeis, that Ker was not related to a treaty violation and therefore is inapplicable, when a charge of treaty violation is made.

In respect, your Honor, to the other categories of cases alluded to by Mr. Williams, I do not think we need to spend very much time on them—you see the point.

The Court: I get your point.

Mr. Kinoy: The Frisbie case—there is no question about that, it doesn't involve this situation.

The Court: I think it is very clear, and I think you have been very articulate. I think I ought to hear the other side.

Mr. Kinoy: Well, I would like to address myself, your Honor, if I may, to one question which I think in fairness both to the court and to the petitioner ought to be discussed, because it was a question which your Honor raised previously in the argument—and that is the issue as to whether or not this question was ever litigated in any other previous proceeding. I do not want to seem to avoid that problem—I think it is a [115] serious problem, I think it is a problem that your Honor raised earlier, and I think your Honor would want to hear our thinking on that question.

Now as your Honor recalls, the motion in arrest of judgment which your Honor referred to early in the argument, involved solely a challenge to jurisdiction over the person, and I would like to suggest to your Honor at this point, as I am sure your Honor is aware, problems of jurisdiction require a close and careful analysis—and the one thing we must avoid is falling into what your Honor would recall we always tried to avoid in law school, the danger of jurisprudence of labels. I do not propose to handle this problem by just putting another label on an identical situation, and if I did something like that your Honor would be correct in saying that I was out of court. That is not this situation.

Why? In every juridical controversy, two separate jurisdictional questions are always involved: Jurisdiction over the person and jurisdiction over the subject matter.

Now in the motion for arrest of judgment, I am sure your Honor will recall; putting aside the question of the

label—and everybody in the court called it jurisdiction over the person—the defendants, the [116] government, your Honor and the Court of Appeals—but putting aside the label, what is the heart of the issue? What is the center or core of the issue, putting aside labels? That motion, your Honor, raised the question of personal rights of the defendant to be immune from arbitrary seizure. It was like Coplon vs. The United States. It was the issue of an arrest without a warrant. The issue there, your Honor, was: Did the kidnapping violate the personal rights in such a way as to defeat personal jurisdiction?

Now I suggest to your Honor that the most cogent analysis of this question, which fully supports the contention I am now raising, is to be found in Judge Frank's opinion—and I don't reject Judge Frank's opinion. I stand by Judge Frank's opinion, and I suggest to your Honor that Judge Frank's opinion completely and fully supports our contention.

Why? Judge Frank points out that the heart of the defendant's contention—and he cites it in the footnote—was whether the defendant's personal rights were so immune to arbitrary seizure as to defeat personal jurisdiction.

Now Judge Frank, your Honor, recalling—

The Court: What disturbs me is this—

[117] Mr. Kinoy: Yes?

The Court: —you will agree with me that a court may, of its own volition, examine into the question of lack of jurisdiction over the subject matter.

Mr. Kinoy: Absolutely right, your Honor.

The Court: Or it has an obligation to do it.

Mr. Kinoy: Yes.

The Court: Judge Frank, you will also agree with me, is one of the most competent men in any court.

Mr. Kinoy: Correct, your Honor.

The Court: You cited Rauscher to him, you cited Clarke to him—in fact, in his opinion he cites Rauscher here.

Ker is cited in his opinion. He says in his opinion also that he doesn't think this falls into the situation, that Ker has no jurisdiction over the offense charged. And yet you end up by saying that all the Judge did was examine into the question of whether there was jurisdiction over the person, and that was the only point argued and that was the only point litigated.

Mr. Kinoy: May I respond to that, your Honor? That is absolutely correct, and I would agree with your posing of the question. What was not present before Judge Frank or your Honor were the fundamental operative [118] facts which showed—what? A treaty violation.

Now I ask your Honor to recall the words "treaty violation" were never used in the court below—was not urged in the court above, but I do not rest on that alone, I do not rest on that alone. The basic facts showing a treaty violation were not before the court—although it is absolutely true, your Honor, I think this is a proper procedure, that a court on its own motion will examine into the jurisdiction of the subject matter, but a court must have the fundamental facts showing a violation of its competence before it, and if the court doesn't have those facts before it, I for one, as an officer of the court, would not criticize that court for not having so decided. That is precisely the point, your Honor.

I think you put your finger right on the center of the issue we are now bringing to your Honor—the precise operative facts showing the treaty violation were never before brought to this court, or, for that matter, to the Court of Appeals; to Judge Frank.

The Court: Well, wasn't it implied from what you were arguing before, that if he had not been legally deported and had been abducted, and had been kidnapped, then certainly he had not been properly extradited.

Mr. Kinoy: No; your Honor, and if there was— [119] and I want to be absolutely fair in this presentation—

The Court: I appreciate that.

Colloquy

Mr. Kinoy: I do not want to imply that the only method was deportation—that there had been an agreement of any kind with the Government of Mexico, and if there had been—perhaps he would have had a claim against the Mexican Government for some arbitrary seizure, but if the Mexican Government had consented to the ejection, that would fall into what I term the second category of cases. That would not be a treaty violation.

Why? A high contracting party always has a right to enter into special agreements, but, your Honor, the petition charges no such special agreements here. There was no special agreement made.

Moreover, the petition charges, the government knew there was no consent—your Honor raises a very interesting question: If there were facts showing treaty violations, they should have been brought to your Honor's attention. I agree with that, and I respectfully suggest that perhaps the prosecution below had that obligation.

Why? They had the obligation to bring that before your Honor.

The Court: How about the defense? It was [120] a defense involving the jurisdiction over the subject matter.

Mr. Kinoy: Absolutely right, your Honor. I do not here say that if these facts were in the possession of the defendant they should not have brought it before the court—of course your Honor is aware that this is unlike the motion previously argued—

The Court: I understand.

Mr. Kinoy: You can't waive it by failure to bring it up, but what is the fact, your Honor? The absolute and basic fact that there was no consent of the Government of Mexico was not litigated in the court, and it was in the possession—so we allege for the purpose of the motion, it was in the possession of the other side. I think the record conclusively shows that your Honor is required to grant a hearing on these facts.

My final point I won't spend any time on at all, because as your Honor indicated, it is, of course, accepted law that this question is never waived—the objection of jurisdiction over the subject matter will never be waived, and I do not obviously have to go into that.

I just want to conclude on this one point, your Honor, that the issues here raised, affecting the national power, arising out of the relationship between sovereign [121] nations, are serious, are fundamental questions of the jurisdiction of the court and are questions which a proceeding in the nature of writ of habeas corpus or the old writ of coram nobis, now codified in Section 2255, were peculiarly designed to correct—peculiarly designed to correct, and I suggest to your Honor that upon this showing your Honor is required to grant a hearing so that we may establish—unless the government will consent to the facts and then your Honor is required to free the prisoner—that if the government denies these facts, your Honor is required to hold a hearing in which we can litigate these facts and in open court, in vindication not only of the rights of this individual petitioner but in vindication of the national sovereignty and the dignity of the United States.

The Court: Mr. Williams!

Mr. Williams: Your Honor, I do not need to be very long in reply.

As a matter of fact, I think that when your Honor looks at the decision again, by the Court of Appeals and the portions of the brief cited—handed up to that court in which the Rauscher case and the Cook case are cited, your Honor will be satisfied that the Court of Appeals in this very case has found that there [122] was no want of jurisdiction of the subject matter.

As a matter of fact, the court stated that under Rule 34, motions in arrest of judgment are allowable only, one, where the indictment charges no offense, and, two, where the court had no jurisdiction over the offense charged.

The Court: I understand that, Mr. Williams, but what about his contention that this question of absence of complying with the extradition treaty was never raised and, therefore he says the extradition treaty, having such a high standard among nations, or a treaty between the country being violated, that issue he said was never litigated, and therefore it involves a question of lack of jurisdiction.

Mr. Williams: Well, that was going to be my second point, if I may just finish my first point.

The first point—the Court of Appeals set aside the Rauscher and Cook cases and they went to the Supreme Court on writs of certiorari, and set both cases under the joint head of "no jurisdiction", and said there was no jurisdiction of the subject matter as well as personal jurisdiction.

Now coming down to the question that you just asked me, which is my second point, their whole argument [123] is postulated on the theory of a treaty violation. I say there was no treaty violation. It is not a violation of any law of the United States or any extradition treaty of the United States if the Mexican Security Police seek to throw an American citizen out of Mexico. It is no conceivable violation of any law of the United States, or of any law of Mexico so far as we know it.

Therefore, their entire foundation on which they ground the argument that there was a limitation on the right of the United States to try its own citizen for a crime committed in this jurisdiction must fall.

Where does the extradition treaty say that an American citizen cannot be tried for seditious conspiracy in the United States, when he is found here in the United States, apprehended here in the United States?

The United States is not concerned and has never been concerned from 1886, the date of the Ker case, with how a

citizen gets back to the United States to stand trial. The Supreme Court is very explicit on that subject.

In the Ker case the court said—there is no language in this treaty—the same point was raised—or in any other treaty made by this country on the subject of extradition, of which we are aware, which says in terms [124] that a party fleeing from the United States to escape punishment for a crime becomes thereby entitled to asylum in the country to which he has fled. Indeed, the absurdity of such a proposition would at once prevent the making of a treaty of that kind.

And later on, in the Frisbie vs. Collins case in 1952, "This court has never departed from the rule announced in Ker vs. Illinois that the power of the court to try a person for a crime is not impaired by the fact that he has been brought in the court's jurisdiction by reason of a forcible abduction. No persuasive reasons are now presented to justify following this line of cases."

Indeed, the Ker case, your Honor, was a more egregious case than the Sobell case. In the Sobell case, the Mexican authorities arrested Sobell in Mexico City and brought him back, your Honor, to the border and turned him over to our agents.

In the Ker case, a Pinkerton detective who, incidentally, was called by the Supreme Court—a messenger of the President of the United States—went down to Peru and arrested that man and forcibly took him out of the country, irrespective of the extradition treaty which was referred to, and brought him back to the State of Illinois for trial, and the Supreme Court said [125] they did not matter in the slightest degree.

So I say to your Honor here, first, there was no treaty violation; second, even if there had been a treaty violation, I say that it is not that kind of treaty violation which would have prevented the trial of this action for the crime of seditious conspiracy.

Now counsel must admit that this was briefed and argued before the Court of Appeals. In Point V, which I have cited before, in their brief on the appeal, at page 63, they argue just exactly what they have argued here, your Honor, and there isn't one thing new about the entire argument today made by defense counsel—just different lawyers arguing the same points for the same man. They said, "A court is concerned with how a defendant is brought from a foreign place when he is brought in violation of treaty or international law"—citing United States vs. Rauscher, Cook vs. United States—"If the kidnapping and involuntary transportation of Sobell from Mexico City to the border was attributable to the agents of the FBI, it was a violation of international law and in contravention of our own law as well."

These words, your Honor, have been stated—these points have been made repeatedly—indeed they have been made ad nauseam, and I say that there was no [126] violation of any treaty for the Mexican police to deport Sobell or to arrest him and deport him. And, as a matter of fact, I use that term advisedly again, because in a book, which I do not consider an authority, "The Judgment of Julius and Ethel Rosenberg", put out by Cameron & Kahn, at page 658 there is a telegram in Spanish, which is quoted, which was sent by the Immigration authorities, United States of Mexico via their national telegraph lines, and it says, if your Honor please: "To the Chief of the Office of Migration, Department of State, Mexican Consulate, Laredo, Texas, informs me of deportation from Mexico to United States of America of the North American; Morton Sobell, which took place at 3:45 A. M. yesterday by secret service agents of the capital, Mexico City."

Did your Honor get the significance of that reference—that this refers to—that they themselves refer to what happened as a deportation?

Colloquy

Now I say that the court, the Southern District of New York, had jurisdiction over the subject matter of this case, which was the crime of seditious conspiracy, the furnishing of top-secret documents to the Soviet agents. I say that the defendant was before the court, and I say that he was properly and fairly tried and [127] convicted of the crime of espionage and conspiracy to commit espionage.

The lack of any legal merit in these papers is an affront to this court. The arguments are obviously designed not so much as for legal consideration as to feed the propaganda mills of this defendant—repeatedly, ever since this trial they started to throw a deprecating and vile stream of abuse upon this court, and I want to go on record in saying that Sobell's petitions are obviously designed for the consumption of those gullible people in this country and abroad—such as Bertrand Russell, who was quoted the other day at a mass meeting in Carnegie Hall, in support of the Committee to Secure Justice for Morton Sobell, in which he said: "I am very glad that a movement is on foot to secure justice for Morton Sobell * * * The evidence upon which he was convicted was not such as any court of justice would have thought adequate in a case not involving hysteria. I am profoundly convinced that the verdict against him was unjust and the sentence monstrously vindictive."

I say, if your Honor pleases, that if those people would only examine the record as carefully as they have evidently digested the twisted abridgments of the testimony in the record which they have been furnished with, [128] their conclusion would have been that this defendant received the fairest possible trial, in the fairest possible court, that he could possibly have received, and in keeping with the highest traditions of American jurisprudence and the American bench.

Colloquy

And I say that the work of Sobell in continuing to turn out petitions like this, that are meritless and groundless is merely continuing the scurrilous attacks upon American justice, which this court can only answer back by denying this motion and by refusing to give him the kind of airing of soap box which they are looking for. This petition is absolutely without merit; all of the facts have been known for years. They were known to the defendant at the time of the trial, in all of the arguments that they have made, have already been made before the Court of Appeals, and they also made them in the petition for certiorari to the Supreme Court, and it is an unfair burden to put on this court, to have a constant reiteration of this type of scurrilous attack, based principally, as they say and have so often said during the oral argument, on the claim of perjury, of subornation of perjury by government agents, and by my former distinguished predecessor.

Mr. Donner: May we have a word in rebuttal, [129] your Honor?

The Court: Yes.

Mr. Donner: Your Honor, I note with some distress that it was the government that has resorted to propaganda and name-calling, that they charge the defense with. We have undertaken the defense of the petitioner here with a deep sense of responsibility of our calling, a responsibility that every right-thinking man feels as a citizen seeking justice in the halls of justice, and I have no further—

The Court: There can be no objection whatsoever to seeking justice in the halls of justice.

I think the objection that has been raised by Mr. Williams is the fact that on occasions some people have resorted to extra-judicial means—and I think you would be the first to object to that if it came on the other side.

By that I mean you would be the first to agree that whenever any court will succumb to pressure on either side, that we might just as well close the halls of justice.

What he has reference to undoubtedly is the fact that there have been these extra-legal means resorted to in order to arouse emotions, public opinion or anything [130] of that character, but nobody can take any offense or objection to means that are resorted to which are directed towards a hearing in a court of law.

Mr. Donner: Your Honor, this petition was prepared with great deliberation, intense research and careful legal thought to the principles involved and underlying the petitions here—I do not think anyone can find exception to our presentation of these legal problems that are worthy and do go to the corruption of justice and the administration of justice in our fair land, and I object to bringing in quotations from Bertrand Russell, from books that are de hors the record, and suggesting that somehow this was done in a way, as an aid or a supplement to the petition for the hearing. That is not so; and I think it is most improper of Mr. Williams to suggest that. We are here with a petition as lawyers, and let us get to our legal business.

Now I would like, if your Honor please, with your Honor's indulgence to make a few observations by way of summary, and take your Honor, if I might say so, on a Cook's tour of our contentions, and what I think are the basic weaknesses of the government's position.

First, it seems to me that it is obvious that the question of jurisdiction of the court has never been [131] litigated. You do not litigate a matter by citing a case like the Cook case; whether or not a matter is litigated is a term that has some legal precision.

Now one may search the motions for judgment of acquittal from beginning to end, or a motion for a new trial and find nowhere any reference to the treaty upon which we rely here, or any reference to the legal principles upon which we rely. Second, there is no exception in favor of American nationals in the treaty—

Colloquy

The Court: Now go to Point V of your brief in the Circuit Court—and you say this was never litigated—this is your language from Point V: "A court is concerned with how a defendant is brought from a foreign place when he is brought in violation of treaty or international law"—and you cite United States vs. Rauscher and Cook vs. the United States.

Mr. Donner: Your Honor, does that mean that we litigated the issue of whether your court had jurisdiction of the subject matter?

The Court: Well, don't you think that an able Judge, like Judge Frank, who many times seizes on points that have not been raised, saw the obvious point you made there, that it was in violation of international treaty?

[132] Mr. Donner: No, he couldn't because we did not present to him or to you the two operative set of facts which are being presented today: First, that this man was kidnapped and abducted with the connivance of the American officials; and, second, there was no consent of the Mexican Government, and those were pre-operative conditions in establishing a violation of the treaty.

The Court: You say the first was not brought to the attention of the court?

Mr. Donner: No, sir, not in the form it was brought here today.

The Court: You mean not in the exact words.

Mr. Donner: Not in the formulation—the same facts have not been presented.

Now the government has made a great deal of this possible ambivalence of the term "deportation". I would like your Honor to share with me two basic observations about this whole question: A deportation first—the jury was given to understand by the use of the term "deportation" that two hemispheric sovereignties cooperated to bring Mr. Sobell—

Colloquy

The Court: Well, you are going all over this again, and it has been most capably argued, and all you are now doing is repeating the same points made by Mr. [133] Perlin and so capably covered by Mr. Kinoy.

Mr. Donner: Very well, your Honor. I simply want to say that the word "deportation" was not chosen casually or obviously. It is a word which has meaning to immigration authorities and lawyers, and I suggest to your Honor that it was the prosecution's theory that the petitioner was deported from Mexico by legal process, and that impression was given to your Honor, and it was given to the Court of Appeals as well.

Now I would like to simply remind your Honor, in conclusion, that your Honor under this statute is required to grant a hearing unless you come to the conclusion from the motion, the records and the other papers that conclusively there is no ground for relief here. I don't think you can come to such a conclusion.

The Court: I will reserve decision.

Mr. Perlin: Your Honor, may we have some time on reply briefs, and furthermore, time to answer the answering affidavit of the government?

The Court: You may have until Wednesday at one o'clock.

Mr. Perlin: Thank you.

Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Appearances:

PAUL W. WILLIAMS, United States Attorney
and
ROBERT KIRTLAND and MAURICE N. NESSEN, Assistant United States Attorneys, for the Government.

DONNER, KINOY & PERLIN, Attorneys for Petitioner Morton Sobell; FRANK J. DONNER, ARTHUR KINOY, MARSHALL PERLIN, BENJAMIN DREYFUS and LUIS SANCHEZ PONTON, of Counsel.

IRVING R. KAUFMAN, *D. J.*

On March 29, 1951, a jury of eleven men and one woman found Morton Sobell guilty of conspiring to commit espionage by transmitting to the Soviet Union, intended for its benefit, "documents, writings, sketches, notes and information relating to the national defense of the United States." Their verdict was returned at the end of an exhaustive trial, at which Sobell's two extremely able attorneys and the able lawyers of his co-defendants, Julius and Ethel Rosenberg, skillfully but vainly tried to stem the avalanche of evidence against them. The trial was held in a manner which impelled the defense attorneys to compliment the Court for its fairness and courtesies on three

separate occasions, and to state that the trial had been conducted "with that dignity and that decorum that befits an American trial."[1]

Now five years later, Morton Sobell has petitioned this Court pursuant to 28 U. S. C. Sec. 2255 to set aside this verdict and judgment, alleging that his constitutional rights have been violated and that the court was without jurisdiction to try him. The contentions now raised by Sobell relate

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[1] At the start of his summation, Mr. E. H. Block stated:

"I would like to say to the Court on behalf of all defense counsel that we feel that you have treated us with the utmost courtesy, that you have extended to us the privileges that we expect as lawyers, and despite any disagreements we may have had with the Court on questions of law, we feel that the trial has been conducted and we hope we have contributed our share, with that dignity and that decorum that befits an American trial." (Printed Record, pp. 1452-53, hereafter R. 1452-53).

After the verdict of guilty was returned against all defendants, the same counsel was moved to say the following:

"Mr. E. H. Bloch: I would like to restate what I said when I opened to the jury. I want to extend my appreciation to the Court for its courtesies, and again I repeat I want to extend my appreciation for the courtesies extended to me by Mr. Saypol and the members of his staff, as well as the members of the FBI, and I would like to say to the jury that a lawyer does not always win a case; all that a lawyer expects is a jury to decide a case on the evidence with mature deliberation. I feel satisfied by reason of the length of time that you took for your deliberations, as well as the questions asked during the course of your deliberations that you examined very carefully the evidence and came to a certain conclusion." (R. 1583).

Even at the time of sentencing counsel said:

"Mr. E. H. Bloch: . . . I believe that in this posture of the case, in retrospect, we can all say that we attempted to have this case tried as we expect criminal cases to be tried in this country; we tried to keep out extraneous issues; we tried to conduct ourselves as lawyers, and I know that the Court conducted itself as an American judge." (R. 1603).

to procedural and constitutional issues which do not go to the question of his guilt or innocence. Even if every one of the contentions now raised by petitioner was to be sustained, it would not follow that he is innocent.[2]

FORMER JUDICIAL PROCEEDINGS IN THIS CASE

The convictions of Sobell and his co-defendants were affirmed by the Court of Appeals for the Second Circuit in a detailed opinion which contained the following language:

> "Since two of the defendants must be put to death if the judgment stands, it goes without saying that we have scrutinized the record with extraordinary care to see whether it contains any of the errors asserted on this appeal." (*U. S.* v. *Rosenberg and Sobell*, 195 F. 2d 583, 590 (C. A. 2, 1952.)

Thereafter, defendants filed a petition for a writ of certiorari to the United States Supreme Court, and this was denied. In the following two years, Sobell participated in two motions brought under Section 2255 of the Judicial Code, each seeking to vacate the judgment on constitutional grounds; both motions were found to be without merit and were denied in the District Court. The denials

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[2] Although the question of a petitioner's guilt or innocence is almost never material in a motion pursuant to Section 2255, I feel constrained to make this point clear, in light of the publicity which has been attendant upon this case over the years.

The finding of Sobell's guilt resulted from the collective and unanimous judgment of twelve conscientious jurors, who had an opportunity to observe the witnesses while they testified and thus adjudge their credibility. The importance of this opportunity to see and hear witnesses as they testify has been attested to time and again by our appellate courts. It is clear, therefore, that this so-called demeanor evidence is of prime importance and that those who have attempted to adjudge the credibility of the witnesses in this case without having observed them testify are proceeding on tenuous ground.

were affirmed on appeal by the Court of Appeals and a petition for writ of certiorari filed after the first motion, was denied by the Supreme Court. After almost every-one of the above decisions, petitions for rehearing were also considered and denied. In addition, numerous applications for relief were made by the Rosenbergs, and although Sobell did not join in them, it is worth noting that none of the attacks on the judgment was sustained.

This then is the background against which petitioner makes his present allegations and accusations of infringement of his constitutional rights. The record shows that in one form or another the case was before the United States Court of Appeals six times, always concluding with an affirmance, and before the United States Supreme Court six times on applications of one sort or another, always ending with the conviction remaining undisturbed, and this tally does not include the numerous proceedings at the District Court level and the various applications to other judges of the District Court.

Sobell's Present Contentions

The basic factual allegations set forth in Sobell's moving papers are not new to this Court. Indeed, they were first raised five days after the verdict on a motion in arrest of judgment. The denial of that motion was specifically affirmed on Sobell's initial appeal to the Court of Appeals, and it was set forth as one of the grounds supporting his prayer for reversal in the defendant's first petition for certiorari to the Supreme Court, which was denied. He argues, however, that although certain of these allegations have been made before, the legal consequences now urged as stemming from them have not been previously considered.

Despite the lack of novelty in petitioner's present assertions, and despite the numerous hearings he has been

accorded, the Court has again painstakingly re-examined the record in the light of his instant allegations. Such is the way in which a democratic society administers justice—carefully, meticulously, and even repetitiously—lets an error go undetected. Under our judicial system we impose a strong check upon the manner in which a prosecution may be conducted.

It is difficult to find a case in the history of American jurisprudence, or indeed in the judicial annals of any other country, where the defendants' convictions and contentions have received the attention of so many judges at so many levels of a judicial system, as well as that of the President of the United States on applications for executive clemency. Not a single legal recourse has been or will be denied to Sobell.

In his present petition, Sobell avers that he was kidnapped from Mexico by agents of the Mexican Secret Police who were acting under the orders of the FBI, and that he was thus forcibly and illegally returned to the United States against his will. He does not assert, however, that this alleged abduction deprived this court of any jurisdiction over his person. On the contrary, he not only concedes that he waived any such claim (assuming he would have had one) but he also asserts that he would have returned willingly to stand trial.

The first argument he now makes concerning this so-called abduction is that it denied him the opportunity to return to the United States willingly, and that it was staged for the sole purpose of permitting the prosecution to represent to the jury that Sobell was a fugitive from justice. He asserts that when the government introduced evidence to show that he had been "deported" from Mexico, this was subornation of perjury on the part of the prosecutors, as they then well knew that Sobell had not been deported in accordance with established Mexican procedures. He al-

leges further that the government deliberately suppressed evidence relating to this abduction and made misrepresentations to the Court about it—and that any one of these alleged improprieties, if established, would show a deprivation of petitioner's constitutional rights.

His second attack, set forth in a separate motion under Section 2255, is that this alleged kidnapping violated a treaty between the United States and Mexico. He argues that since this extradition treaty is the law of the land, its violation deprived the courts of this country of jurisdiction over the subject matter of this offense. Since unlike jurisdiction over the person, lack of jurisdiction over the subject matter cannot be waived by a defendant, Sobell claims that this defect vitiated the entire trial, and that his conviction is a nullity.

THE LAW GOVERNING MOTIONS PURSUANT TO SECTION 2255.

Section 2255 of the Judicial Code permits a convicted prisoner to move to set aside the sentence if it was imposed in violation of the Constitution or laws of the United States, or if the sentencing court was without jurisdiction to impose that sentence. The court then has a duty to order a prompt hearing upon the petitioner's allegations "unless the motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief."

In opposing the instant motions, the government has taken the position that Sobell's factual allegations regarding the prosecution's misconduct during the proceedings are completely contrary to the record, and that his legal arguments stemming from the allegations of his kidnapping are totally devoid of merit. In short, the government urges that Sobell's present allegations furnish no basis for vacating his conviction either because of violation of his constitutional rights or because this court was without jurisdic-

tion to try him, and thus no hearing on their veracity is necessary. In passing on these motions, therefore, the Court is required to accept all of petitioner's averments as true insofar as they are not inconsistent with the record. *Pelley* v. *United States*, 214 F. 2d 597 (C. A. 7) *cert. denied* 348 U. S. 915 (1954); *United States* v. *Sturm*, 180 F. 2d 413 (C. A. 7) *cert. denied* 339 U. S. 986 (1950).

Basically, the petitioner's allegations are that he and his family went to Mexico City in the spring of 1950, where they resided openly and under their own name. On the night of August 16, 1950, he says agents of the Mexican Secret Police entered the Sobell apartment there and arrested him without a warrant. When he tried to resist, he adds, they beat him into unconsciousness and took him to an unidentified building where he was detained overnight —held completely incommunicado. The next day, he continues, he was forced to enter an auto with several of these agents, and they drove towards the border, stopping occasionally for the agents to make telephone calls—presumably with regard to Sobell. When he reached the border bridge, a United States agent entered the car—though still on Mexican territory—and he rode with them to the U. S. Customs Office. There Sobell found that his wife and children had also been brought back. He was "directed to sign a card", he says, and after his baggage was searched he was placed under arrest and taken to jail. He avers that this whole abduction was in violation of Mexican law and that the Mexican Secret Police had no legal authority to treat him in this fashion;—he charges that they were merely acting as agents of the Federal Bureau of Investigation. He further avers that at the time of his seizure he had been planning to return to the United States—his trip being but a vacation jaunt—and this abduction prevented him from returning voluntarily.

With reference to his motion challenging the court's jurisdiction to try him, Sobell makes the further allegation that his expulsion was in violation of the Treaty of Extradiction between the United States of America and the United States of Mexico. 31 Stat. 1818. It is upon this last allegation that he bases his argument that this court was without jurisdiction to try him. I shall deal with that contention first.

MOTION I.

Sobell's Contention That This Court Lacked Jurisdiction To Try Him.

It is Sobell's position that the United States breached the extradition treaty with Mexico in two ways; first, because the offense with which he was charged was not among those enumerated in the treaty as extraditable [3], and second,

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[3] Actually this first allegation is two-pronged: his first assertion is that espionage was not one of the crimes listed in the treaty and this is certainly true—although the conclusions he draws from that fact are incorrect. His second is that the treaty specifically excludes political offenses and he claims his was a political offense. This latter contention is, of course, completely meritless. Sobell was charged with and tried for conspiracy to commit espionage—a non-political crime. The fact that he was a Communist was introduced to show motive for the crime, because unless some reason for his actions were shown, such as devotion to the cause of the Soviet Union, it would be difficult to understand why an American would thus spy upon his country for the benefit of the Soviet. And the fact that Sobell and Elitcher were associated in this case also gave probative weight to Elitcher's story that he was approached several times by Rosenberg and Sobell to join their conspiracy; the fact that he was in sympathy with their ultimate cause undoubtedly was what impelled the defendants to trust Elitcher not to divulge their machinations despite his own decision not to take an active role. The jury was specifically and continually warned that Sobell was not being tried for Communism, and I might point out that the jury which was selected was one with which the defense indicated satisfaction before they had used up all their peremptory challenges.

because the manner of this removal from Mexico "flouted the treaty requirements for specified official removal arrangements with duly constituted authorities of the Government of Mexico and for proceedings under Mexican law to determine probable guilt and justification for removal." (Petitioner's Second Memorandum, p. 22.) These two facts, he charges, operate to invalidate the subsequent proceedings against him, because "(a)n existing extradiction treaty fully controls the national power to conduct criminal proceedings involving alleged fugitives found in another treaty country. Absent treaty compliance, the power of the nation—and thus of its judiciary—fails *ab initio.*" (Petitioner's Second Memorandum, pp. 11-12.) Further, Sobell contends, this lack of judicial power is not merely lack of jurisdiction over the person of the accused who has thus been wrongfully seized, it is total lack of judicial power over the subject matter of the offense.

This final argument defining the type of jurisdictional defect is vitally necessary to petitioner here, as concededly, any question as to the trial court's jurisdiction over his person was voluntarily waived by him, and the court's jurisdiction over his person has been specifically upheld by the Court of Appeals. Indeed, defense counsel stated on oral argument of this motion: "I am not here urging the matter of personal jurisdiction of the defendant. . . . That was litigated . . . and Judge Frank said they raised that too late and . . . it had been waived. Your Honor, if we were dealing with the matter of personal jurisdiction, we are out of court." (Transcript of Oral Argument, p. 34—hereafter T-34.)

Accepting defense counsel's assertion, I find that this motion is raising the precise issue of personal jurisdiction, and that on that score alone, to paraphrase, Sobell is "out of court." Further, even assuming the jurisdictional question could be reached, I find that there was no violation of any treaty, that Sobell has no standing to raise

this question and that the court properly had jurisdiction of his person.

A. This Is A Question Of Personal Jurisdiction

The entire question of the effect of this alleged kidnapping upon the legality of Sobell's trial was first raised by the defense by a motion in arrest of judgment made five days after the trial, at which time they submitted an affidavit setting forth the circumstances of Sobell's seizure. The motion was denied on the ground that if these facts existed, they were admittedly within the knowledge of defendant and his attorneys before and during the trial, and that the defense had made a deliberate decision not to call them to the court's attention (R. 1590-1595).

On appeal to the Court of Appeals, the question of the trial court's jurisdiction over Sobell was specifically argued in defendant's brief which cited *United States* v. *Rauscher*, 119 U. S. 407 (1886), and *Cook* v. *United States*, 288 U. S. 102 (1933), the two cases chiefly relied on in the present motion. Their contentions were rejected. Speaking through Judge Frank, the Court stated:

> "Sobell waived his right to challenge personal jurisdiction in this trial . . . (H)he made no move to bring to light the facts of his alleged illegal abduction. He preferred to take his chances on the verdict, withholding his trump card until the trial was over. The Federal Rules of Criminal Procedure allow no such tactic." (*United States* v. *Rosenberg and Sobell*, 195 F. 2d 583, 603 (C. A. 2) *cert. denied* 344 U. S. 838; *rehearing denied* 344 U. S. 889 (1952).

Despite that flat statement, the defendants contend that they are free to raise this question again because they now allege that this abduction deprived the Court of jurisdiction over the subject matter, and the Court of Appeals has not

considered that point. It is difficult to see how counsel can make that argument in good faith in light of the fact that a court is duty bound to raise the question of jurisdiction over the subject matter on its own motion, even if the issue is not placed before it, *e.g.*, *Defiance Water Co.* v. *Defiance*, 191 U. S. 184 (1903); *United States* v. *Bradford*, 194 F. 2d 197 (C. A. 2) *cert. denied* 343 U. S. 979 (1952), and here the operative facts and chief cases were brought to the Court's attention.[1] The contention that three extremely able and experienced judges—Chief Judge Swan and Judges Chase and Frank—did not consider this point because petitioner used the label "personal" jurisdiction, is not only an insult to their intelligence but it completely ignores the Court's specific statement that "(u)nder Rule 34, motions in arrest of judgment are allowed only (1) where the indictment charges no offense and (2) *where the court has no jurisdiction over the offense charged. This situation we think falls into neither category.*" 195 F. 2d at 603 (Emphasis supplied).

Further, Sobell's counsel concede that there would have been no question of the court's power to try Sobell for the offenses charged had it not been for the manner of his apprehension (T-95). Thus, by counsel's own admission the only lack of power was that over Sobell's person, and the rule is clear that in a criminal case a court has jurisdiction of the subject matter if it has jurisdiction of the crime charged. Moreover, without exception, every single case which petitioner cites to uphold his position makes it patently clear that the jurisdictional question involved in all cases of irregular seizure of fugitives is the question of

[1] Indeed, both Sobell's brief on appeal and his petition for writ of certiorari set forth substantially the same argument he now raises. Moreover, in his petition for certiorari, the allegedly misleading "personal" label was dropped from his discussion of the jurisdictional problems raised by the alleged kidnapping.

jurisdiction over the person of the defendant.[5] In the *Cook* case, upon which defense relies so heavily, jurisdiction over a "person" was not involved as the case concerned the court's jurisdiction to forfeit a British vessel, illegally seized on the high seas, and it was clear that the sole question was the court's power over the specific vessel.[6] Further, in every one of the cases where relief was granted, the jurisdictional issue was timely raised.[7] Indeed in the case of *Ford* v. *United States*, 273 U. S. 593 (1927)—a case on all fours with *Cook*—petitioners were denied relief because the jurisdictional question had not been raised on time. It is apparent, therefore, that no jurisdictional question other than that of personal jurisdiction was raised by the problem of irregular seizure, or else the Court would not have found a waiver.

It is clear that petitioner's present argument re jurisdiction is but a tw ce-told tale in new semantic guise. He seems to believe that by the mere device of changing attorneys and relabeling his claims, he may return to court time after time with the same basic argument. The petitioner speaks of justice, "(b)ut justice though due to the accused, is due to the accuser also,"[8] and it is due also

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[5] *Johnson* v. *Browne*, 205 U. S. 309 (1907);
Cosgrove v. *Winney*, 174 U. S. 64 (1899);
United States v. *Rauscher*, 119 U. S. 407 (1886);
United States v. *Mulligan*, 74 F. 2d 220 (C. C. A. 2, 1934);
United States v. *Ferris*, 19 F. 2d 925, N. C. Calif. 1927.

All the other cases cited in petitioner's brief similarly point up the fact that irregular seizure raises solely the question of defendant's personal right to be free of the jurisdiction of an otherwise competent court. These other cases are not relied on by petitioner, however, as they are all completely contra to his present position, and he cited them only in an attempt to distinguish them. The futility of his attempt and the inapplicability of even those cases he has relied on will be discussed *infra*.

[6] I shall spell out the details of the *Cook* case, *infra*.

[7] See the five cases cited in footnote 5 *supra* and *United States* v. *Cook*, *supra*.

[8] *United States* v. *Insull*, 8 F. Supp. 310, 313 (N. D. Ill. 1934).

the Court which in its role of defender of justice must conscientiously wade through the voluminous briefs, affidavits and cited materials seeking merit in a contention so devoid in legal basis as to make its presentation tantamount to an abuse of process.

B. The Trial Court Had Jurisdiction

Although the fact that this motion is but another attack on the court's personal jurisdiction is sufficient reason in itself to deny the first petition, I find that the jurisdictional argument presented is totally lacking in merit, and I shall briefly consider it here, regardless of the principles of waiver and res judicata, lest petitioner urge that he is being deprived of his freedom on a mere technicality. Although this Court cannot consider these basic rules of waiver and res judicata to be "a mere technicality", nevertheless in the case of this petitioner I prefer that my decision not be based solely upon these fundamental legal principles but that it also rest upon a consideration of the merits.

Petitioner's contention with regard to this jurisdictional question is that his seizure violated a treaty, and the courts are bound to uphold the treaty which is the law of the land by finding the United States government to be devoid of power to proceed against him. He argues that *Cook v. United States*, 288 U. S. 102 (1933) is controlling here. In that case, the United States had seized a British vessel in the high seas and had started forfeiture proceedings against it for violation of the prohibition laws. Because of the liquor smuggling problem during prohibition, the United States and Great Britain had entered into a treaty which permitted British ships to enter United States ports with personal liquor stores on board in return for permitting the United States to seize British smugglers while still on the high seas, if they were within one hour's sail of this country. The ship Mazel Tov had been seized beyond that

distance; thus the seizure had been in direct violation of the treaty provisions and the court held that it had no jurisdiction to condemn the vessel. The court at that time distinguished situations where American ships had been seized in foreign waters for violation of American law. Such seizures were in violation of international law, but the Court said this did not operate to deprive the courts of jurisdiction. The *Richmond*, 13 U. S. (9 Cranch) 102 (1815); The *Merino*, 22 U. S. (9 Wheat.) 391 (1824). Thus the distinction that petitioner relies upon is that where a specific treaty is violated, as opposed to general international law, the courts will find themselves powerless to act.

This distinction is vital to his argument, as he leans upon it entirely in his attempt to avoid the controlling principle of law which the courts of this country have followed for seventy years. The rule is that a seizure of a fugitive on foreign soil in violation of international law will not deprive the courts of the offending state of jurisdiction over the person of the fugitive when he is brought before them. The question of violation of international law, they have continuously reiterated, is to be left to the proper consideration of the political and executive branches of the government should the offended state choose to raise the issue.[9]

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[9] *Ker* v. *Illinois*, 119 U. S. 436 (1886);
United States v. *Dixon*, 73 F. Supp. 683 (E. D. N. Y. 1947);
United States v. *Insull*, 8 F. Supp. 310 (N. D. Ill. 1934);
Ex parte Lopez, 6 F. Supp. 342 (S. D. Texas 1934);
United States v. *Unverzagt*, 299 Fed. 1015 (W. D. Wash. 1924); aff'd 5 F. 2d 492 (C. C. A. 9), *cert. denied* 269 U. S. 566 (1925).

This listing does not include the numerous decisions reaching similar conclusions regarding interstate aductions, *e.g. Pettibone* v. *Nichols*, 203 U. S. 192 (1906); *Mahon* v. *Justice*, 127 U. S. 700 (1887).

See also 1 Moore on Extradition, Chap. VII, Irregular Recovery of Fugitive.

In *In re Johnson*, 167 U. S. 120, 126 (1897), the Court used the following language to explain its rationale:

> "The law will not permit a person to be kidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim, but in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest."

This principle has been followed again and again, in case after case involving charges of illegal abduction of a criminal defendant from another state or country—cases which petitioner has tried to distinguish on erroneous grounds completely contrary to the language of the courts themselves (See cases cited footnote (9) *Supra*). This principle was most recently re-affirmed in *Frisbie* v. *Collins*, 342 U. S. 519 (1952). That case—decided after *McNabb* v. *United States*, 318 U. S. 332 (1942), had extended the courts' role as supervisors of the administration of justice—indicated clearly that not only are there no jurisdictional issues raised by such abductions but there are no due process problems involved either. Speaking for a unanimous Court, Mr. Justice Black stated:

> "This Court has never departed from the rule announced in *Ker* v. *Illinois*, 119 U. S. 436, 444, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction'. No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in

> the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."

One exception to this general rule follows where the United States has invoked an extradition treaty in order to compel a foreign state to surrender a fugitive. In such circumstances, if the United States then tried the fugitive for a crime other than the one for which extradition was granted, it will be held to have violated the contractual obligations of the treaty and the courts will find themselves to be without jurisdiction over the defendant, unless he waives this issue. This rule was enunciated in *United States* v. *Rauscher (supra)*, and followed in *United States* v. *Mulligan, supra*; *Cosgrove* v. *Winney* (*supra*) and *Johnson* v. *Browne, supra*. The compatibility of the *Rauscher* and *Ker* doctrines is illustrated by the fact that both were decided on the same day with the same Justice writing for the Court. *Ker* clearly distinguished the *Rauscher* situation as one in which the fugitive is clothed in the rights of the treaty.

It is patently obvious that Sobell is clothed in no such treaty rights. He urges that the fact that there was an extradition treaty in force in itself protected him from seizure or surrender save with reference to it and that his seizure was thus violative of its provisions. This same argument was made by *Ker* who was kidnapped from Peru by a United States emissary despite the existence of an extradition treaty, and his contentions were rejected. The Court pointed out that the sole obligation the surrendering state undertakes in an extradition treaty is that it will bind itself to extradite fugitives sought for certain enumerated offenses, where formerly it could have used its own discretion. And the sole obligation of the demanding state is that if it invokes formal extradition proceedings, it will try the surrendered fugitive only for the specific crime charged. Informal expulsion procedures are still available to the

surrendering state both for enumerated and certainly for non-enumerated crimes, see IV. Hackworth, Digest of International Law, Chapter XII., and if the demanding state recovers its fugitives through illegal channels in violation of another nation's sovereignty, that creates a question for the political branches of the government, but does not raise any concerning judicial jurisdiction. See Moore, *op. cit.*

Thus the petitioner is certainly not within the rule of the *Rauscher* case, nor is his situation even remotely similar to that of the British ship seized in *Cook*.[10] Further, his own allegations indicate that the Mexican Police were the chief actors in his abduction, although he charges that they were acting illegally. This means his argument is blocked also by the rule that even a diplomatic demand for the return of an illegally seized fugitive need not be honored where officials of the asylum state took part in the illegal seizure. Note, Kidnapping of Fugitives from Justice on Foreign Territory, by Lawrence Preuss, 29 American Journal of International Law 502, 507 (July 1935). It is noteworthy that the petitioner has not even suggested that such a demand was ever made by Mexico.

It is clear that Sobell's argument that this Court lacked jurisdiction to try him because of his alleged illegal abduction would have been rejected as completely fallacious even had it been timely raised, and this is undoubtedly the reason his adroit lawyers refrained from making this motion among their numerous other applications for pre-trial relief.

Since the trial courts undoubtedly had jurisdiction over the subject matter, we shall now proceed to examine the second motion in order to determine whether the prosecution's actions were of such a nature as to deprive the petitioner of his constitutional rights, and vitiate the proceedings.

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[10] The sole remaining case cited by Sobell as supporting his position is *United States* v. *Ferris*, 19 F. 2d 925 (N. D. Calif. 1927), and that case is on all fours with *Cook*.

II. Sobell's Contention That He Was Denied Due Process of Law.

Sobell's contentions here are that the prosecution suppressed evidence, knowingly introduced perjured testimony and false evidence, and made misrepresentations to the court.[11] Since his contentions are based in part upon occurrences at the trial, I shall set forth the relevant background briefly.

The direct evidence against Morton Sobell fell into two categories. First, Max Elitcher, a close friend, testified that Sobell had taken an active part in the conspiracy and had attempted to get him to reveal secret information concerning the national defense. This testimony was totally damning and convincing to the jury, and he was subjected to an intensive and exhaustive cross-examination by the attorneys for both defendants.[12] The court charged the jury specifically that they were to acquit Sobell if they did not believe Elitcher. The jury convicted. In short, the defendant was clearly proven to be an arch conspirator with the Rosenbergs in their plan to commit espionage against the United States by trafficking in our deepest military secrets—a crime of the highest magnitude.

The second category of evidence against Sobell related to his intent to flee the country. It had been brought out

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[11] The law is clear that if the prosecution knowingly either introduces perjured evidence against a defendant, or suppresses evidence favorable to him or makes misrepresentations to the court during the trial, that defendant is entitled to relief pursuant to Section 2255. The cases cited by petitioner all merely illustrate these well known maxims by which I must be guided. I do not set them forth at length here because there is no controversy as to the guiding rules of law, there is merely a question as to whether petitioner's allegations make out a case under them.

[12] Elitcher's cross-examination lasted two days and occupied 121 pages in the printed record. (R. 264-379, R. 388-394.)

previously by David Greenglass that Julius Rosenberg, the head of the espionage ring, had urged him and his family to flee if the FBI started to close in, and had given Greenglass $4,000 to flee to Mexico and thence to Europe via Tampico (R. 522-537). Subsequently, it was established that Sobell had gone to Mexico with his family in the Spring of 1950. He had gone openly and under his own name;[13] however, it was shown without contradiction that while in Mexico Sobell traveled to both Tampico and Vera Cruz using aliases; that he had inquired as to how he might leave Mexico for Europe without proper papers; that while in Tampico and Vera Cruz he had enclosed letters to his wife in Mexico City in unmarked envelopes sent to a neighbor; and that while in Mexico he had sent letters to his family in America, not directly, but enclosed in envelopes which listed false names as return addresses, and he had sent these envelopes to a friend requesting that he forward the letters. These facts were brought out by six disinterested witnesses, and the defense made no attempt to cross-examine them and even conceded the use of several of these different aliases.

William Danziger, an old friend of Sobell's, testified that he had received letters from an M. Sowell and M. Leyitov as the return addresses residing in Mexico; that he had opened them and found a note from Sobell requesting that he forward the enclosed letters to other members of the Sobell family. Sobell also requested Danziger to tell another relative that Sobell could be reached under the name of M. Sowell at a specified street address in Mexico. Danziger was not cross-examined (R. 857-867).

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[13] It is noteworthy that the prosecution made no mention of Sobell's manner of departing from this country, and that his own attorneys did not see fit to introduce the airline manifests which showed that the family had traveled under its own name, although the defense did argue this point in summation. (R. 1502-1504.)

Thereafter, the government called to the stand Manuel Giner De Los Rios, a neighbor of the Sobells in Mexico City. De Los Rios testified that Sobell had approached him for information as to how a person could leave Mexico without papers, saying that he was afraid to return to the United States because he did not want to go back into the Army, having already experienced one war (R. 922). It was subsequently shown that Sobell had never been in the Army, having been continually deferred (R. 955). De Los Rios also testified that Sobell had left his family and traveled to both Tampico and Vera Cruz. He knew this because during Sobell's absence, he had received two unmarked envelopes bearing postmarks from those two cities; inside each he found a letter beginning "Dear Helen" (the name of Sobell's wife), and he had turned both letters over to Mrs. Sobell. Again there was no cross-examination (R. 924-926).

Subsequently, Minerva Bravo Espinosa, a clerk in a Vera Cruz optical store, testified that Sobell had ordered a pair of glasses from her using the name M. Sand, and defense counsel conceded this fact (R. 927-930). Similarly, Jose Broceado Vendrell testified that Sobell had registered at his hotel in Vera Cruz as Morris Sand; again this fact was conceded and there was no cross-examination (R. 931-932). Dora Bautista, a hotel clerk in Tampico, testified that Sobell had registered in her hotel as Marvin Salt, and this too was conceded (R. 933-934). Glenn Dennis, an official of the Mexican Airlines, was called to testify, and via his testimony and defense concessions it was established that Sobell had flown from Vera Cruz to Tampico under the name of N. Sand, and from Tampico to Mexico City under the name of Morton Solt (R. 935-938).

Not once during the trial did the defense attempt to explain the strange actions of this man and thus eradicate the impression of flight and guilty consciousness thus cre-

ated. In summation defense counsel merely referred to these actions as "a brainstorm" which he said was none of anyone's business (R. 1503-1504).

Immediately after these "flight" witnesses were called, the government attempted to introduce an immigration manifest card noting Sobell's return to the United States; the card was marked "deported from Mexico". The government attempted to introduce it as a record made in the ordinary course of business by the Immigration Service, but upon objection, the card was not allowed into evidence until the following day when James S. Huggins, the Immigration Inspector who had filled out the card, was flown to New York from Texas to authenticate it. He testified that the card was made out in the regular course of his duties, that he had obtained the information on it from Sobell himself when Sobell was brought to the border, except for the information regarding Sobell's "deportation". He explained that he had made the notation based on his *personal observation* that Sobell had been brought across the border by Mexican police. Despite repeated insistent questioning by defense counsel, he never suggested that he had made the entry because of any official information given him by the Mexican authorities or agents. He reiterated that the entry was based solely upon his observations at the time, and that he obtained Sobell's signature by telling him that all deportees must sign such cards (R. 1025-1037).

It is largely upon Huggins' testimony that petitioner bases his claims regarding suppressions of evidence and perjury.

A. There Was No Perjury

It is the petitioner's contention that Huggins perjured himself when he testified that Sobell had been deported as he then well knew that Sobell's seizure had been contrary

to Mexican deportation procedure; and the prosecution was allegedly in possession of this information also. Petitioner urges that this was harmful as it erroneously gave the jury the impression that Sobell's expulsion had been ordered after Mexico had made a prior determination of his guilt via a legal deportation proceeding.

This contention is clearly refuted by the cold record which shows that time after time Huggins insisted that his notation was not based on official sources, but was based solely upon his own observations of Sobell's summary ejection. It is entirely clear that he was using the word "deported" to mean expelled or ejected, and clearly even Sobell must have understood the notation to have that meaning as he himself signed the card when told that all deportees must do so.

It should also be noted that in summation, Mr. Kuntz, Sobell's attorney, pointed out that Sobell had not been legally deported from Mexico; he argued that if Sobell had been deported the government would have shown it by other more competent evidence (R. 1505-1506). When Mr. Saypol, the prosecutor, summed up, he nowhere stated—or even inferred—that Sobell had been legally deported, but stated instead that "the FBI caught up with him and brought him back and you have him here" (R. 1534). Patently, this does not show an attempt by the prosecution to create the impression of legal deportation as is now charged. Manifestly, it was the prosecution's intention to use Huggins' testimony to point up that Sobell's return to this country had been involuntary. Thus it was the natural capstone to the clear and convincing testimony regarding Sobell's attempt to flee. Obviously, the defense attorneys also believed this was the sole purpose of introducing that evidence. They did not even attempt to bring the question of improper deportation procedures to the attention of the Judge out of presence of the jury—a device they had frequently employed throughout the trial—despite the fact

that 24 hours elapsed between the time defense counsel saw the immigration manifest and the time that it was finally introduced into evidence via Huggins' testimony.[14]

Clearly Huggins' testimony was not perjurious, nor was the manifest false, as it could rise no higher than Huggins' explanation regarding the "deportation" notation. Thus petitioner's allegations of perjury are completely unfounded.

B. The Government Did Not Suppress Any Evidence

(1) It did not suppress evidence regarding Sobell's alleged abduction.

Sobell's first contention regarding suppression of evidence is that the government suppressed the fact that he had been illegally abducted, both before trial and during it. I shall first deal with the prosecution's conduct before trial.

It is hornbook law that the prosecution cannot suppress evidence or facts if they are known to the defense, and if it is true that Sobell was abducted, this fact was clearly and admittedly within the possession of Sobell and his counsel before the trial. Indeed, his affidavit makes it clear that Sobell knew that this alleged illegal seizure was highly irregular. The petitioner now alleges that the defense was

[14] Upon oral argument of the present motion, the petitioner's counsel made an issue of the fact that the prosecutors have not submitted affidavits with regard to their purpose in introducing Huggins' evidence. This type of argument completely disregards the cold, stark reality, that it is not what the prosecution intended that matters but what Huggins actually said and did. And I am sure that had such affidavits been introduced to show that the prosecution sought only to establish involuntary return, not legal deportation, the petitioner's attorneys would have insisted just as vehemently that the prosecutor's state of mind was completely immaterial.

not in possession of sufficient facts showing that the FBI had instigated this procedure as is charged now—but this is hard to believe, in light of Sobell's assertions in his first affidavit, submitted in support of his motion in arrest of judgment—that an FBI agent was waiting for him on the Mexican side.

Further, there is no duty upon a prosecutor to present to the court a question which an intelligent and well-represented defendant sees fit not to raise on his own behalf, and which if raised, would be based necessarily on an argument that the Supreme Court should reverse a 70 year old rule of law.[15]

Dealing next with the contention that the prosecution should have brought out the facts regarding the alleged kidnapping during the trial—I cannot see in what way this would have been beneficial to Sobell, nor quite obviously, could Sobell's trial attorneys for they saw fit not to raise the issue before or during the trial. Even if this story might have created some sympathy for the defendant, it was incumbent upon the defense to raise this issue, if indeed the embellishments were not a figment of Sobell's imagination.

Since the defense had not seen fit to object to Sobell's alleged abduction, there was no ground upon which evidence regarding his involuntary return could be kept out, and as I previously pointed out, Huggins did not perjure himself. He merely stated that Sobell had been brought to the border by Mexican Secret Police and he stated further that the FBI was waiting for him.

The petitioner now contends that to rebut Huggins' testimony of seemingly routine expulsion, the defense would have had to put Sobell on the stand and that forcing

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[15] That this jurisdictional issue could be waived and that the law would have been contrary to the petitioner's assertions, assuming he had decided to raise this issue, was spelled out in my discussion of his first motion *infra*.

this choice was unconstitutional. There are three grounds for rejecting this argument, each sufficient in itself.

First, factually, this is not so. There were other available means of telling Sobell's story: (a) Sobell's own affidavit attests that Mrs. Sobell was a witness to the abduction; she was in court, but Sobell saw fit never to ask her to testify. (b) The record indicates that the defense had subpoenaed certain Mexican official documents—but decided not to introduce them. Indeed, a representative of the Mexican government was in court and was excused by the defense. (c) The defense did not even cross-examine Huggins on this point in an attempt to elicit from him that Sobell was in an obviously dazed condition, garbed in blood spattered clothes and that he complained to Huggins of his mistreatment, as petitioner now avers. As the Court of Appeals for the District of Columbia Circuit stated in *Smith* v. *United States*:

> "The right to impeach * * * witnesses and to bring out on cross-examination the facts as to the alleged misconduct of the police are safeguards of appellant's right under the due process clause to a fair trial." 187 F. 2d 192, 199 (C. A. D. C. 1950) cert. denied 341 U. S. 927 (1951).

Second, the fact that Sobell might have had to take the stand to present his story does not mean he was denied his rights.

> "The Constitution safeguards the right of a defendant to remain silent; it does not assure him that he may remain silent and still enjoy the advantages that might have resulted from testifying." *Stein* v. *N. Y.*, 346 U. S. 156, 177 (1953).

And it is obvious that Sobell had more to explain than just the testimony of Huggins: Huggins' notation that he

was "deported" from Mexico would have been practically meaningless except in the context of the other witnesses regarding his flight; witnesses to whom I have referred and whose testimony Sobell does not challenge even now. It is interesting to note that Sobell's first attempt to explain his actions in Mexico came in an affidavit submitted on his original appeal to the Court of Appeals, a most unusual procedure, wherein he stated that the arrest of Julius Rosenberg made him think America was about to enter a state of totalitarian repression of free speech, that he decided to flee and used aliases trying to find out how to leave Mexico illegally and that he then changed his mind. This belated explanation was never put before the jury, as he and his attorneys undoubtedly decided it would be wiser not to do so. Sobell may not now be heard to urge that he is entitled to a new trial because the defense strategy on the first trial was not as soundly based as second guessing and fictional fantasies subsequently created indicate to him that it might have been.

> "(It is) of the essence of orderly trials that the right to counsel accorded to defendants by the constitution be not regarded, as the argument here would seem to regard it, as a mere one way street such that, if the strategy and tactics of his trial counsel, in determining not to raise constitutional questions, prove unsuccessful, defendant * * * may many years later set it aside in order that, on another trial with another counsel, another course raising these questions may be taken and so on *ad infinitum*." *Bowen* v. *United States*, 192 F.2d 515, 517 (C. A. 5, 1951) cert. denied 343 U. S. 943 (1952).

This principle set forth in *Bowen* is equally applicable to the third grounds for rejecting Sobell's argument. Even assuming that the introduction of the evidence regarding

his testimony was improper—and I have pointed out that this is not the case—he is barred from raising that question now. Time after time the courts have held that whenever knowledge was in the possession of defense counsel during trial of facts which either established the impropriety of certain evidence, or even cast doubts upon its admissibility, they are barred from raising this question on a motion to vacate judgment. Questions on the admissibility of improper evidence may be raised solely upon appeal from the conviction.[16]

> "Where parties, even in a criminal case, knowingly and deliberately adopt a course of procedure which at the time appears to be to their best interest, they cannot be permitted at a later time, after a decision has been rendered adverse to them to obtain a retrial according to procedure which they have voluntarily discarded and waived." *Carruthers* v. *Reed*, 102 F. 2d 933 (C. A. 8) cert. denied 307 U. S. 643 (1939).

(2) No other evidence material to Sobell's case was suppressed.

The petitioner also contends that two documents which were seized from him at the time of his abduction were suppressed; they are his tourist card and a vaccination certificate. This contention is farcical on its face, as Sobell

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[16] *United States* v. *Lawrence*, 216 F. 2d 570 (C. A. 7, 1954);
Dauer v. *United States*, 204 F. 2d 141 (C. A. 10), *cert. denied* 346 U. S. 889 (1953);
Klein v. *United States*, 204 F. 2d 513 (C. A. 7, 1953);
Smith v. *United States*, 187 F. 2d 192 (C. A. D. C. 1950), *cert. denied* 341 U. S. 927 (1951);
Hilliard v. *United States*, 185 F. 2d 454 (C. A. 4, 1950);
Howell v. *United States*, 172 F. 2d 213 (C. A. 4), *cert. denied* 337 U. S. 906 (1949);
United States v. *Kranz*, 86 F. Supp. 776 (D. N. J. 1949);
United States v. *Cameron*, 84 F. Supp. 289 (S. D. Miss. 1949).

knew of the evidence. He also knew who had it and never sought its production, though he sought the production of numerous other documents. Further, the two items in question were not material to petitioner's case.

The first of these, his tourist card, could have established merely that Sobell went to Mexico under his own name; this was never denied or mentioned by the prosecution, and was specifically referred to by Mr. Kuntz in summation. Further, defendant's exhibits in this motion indicate that Sobell's attorneys had manifests of the airline on hand which clearly showed he traveled in his own name. They obviously decided, for trial strategy, not to introduce them.

As for the vaccination certificate, Sobell claims this shows he intended to return to the United States as it would be necessary for re-entry; he neglects to mention that this was an international certificate equally valid and equally necessary for entry into many foreign countries.

C. The Prosecution Made No Misrepresentations To The Court

Both alleged misrepresentations which I shall hereafter set forth, were made to the Court by Mr. Saypol after the verdict had been rendered, upon argument of the motion in arrest of judgment. It is difficult to see how by the wildest stretch of the petitioner's vivid imagination these comments could have influenced the jury's verdict. Moreover, his comments had no effect on post-trial proceedings. Aside from my own personal recollections, it is clear from the record that Mr. Saypol's remarks were completely immaterial to the reasons behind the initial denial of the motion in arrest of judgment; the denial was based solely upon waiver, and Mr. Saypol's remarks did not deal with that question. Finally, even if Mr. Saypol's remarks could con-

ceivably be considered as having had any influence upon the trial court—to say nothing of the Court of Appeals' later independent determination of this question—any possible harm done was negatived by the fact that petitioner has here been given an opportunity to relitigate in full the questions he raised on that first motion.

Since the remarks charged to Mr. Saypol were not false, however, and since I do not like to see men smeared by baseless accusations, I shall deal with them briefly.

First, when Sobell's initial petition was read to the Court on the motion in arrest of judgment, it contained language to the effect that, when arrested, Sobell had tried to show the agents his visa. Mr. Saypol pointed out "this very affidavit contains a falsehood in the statement that there was exhibited amongst other things to the Mexican authorities visas. Counsel ought to know that his client never went into Mexico with a visa" (R. 1598). That Sobell never had a visa is now conceded by his attorneys; he had a tourist card, and there is an appreciable difference between the two.

Second, Mr. Saypol is charged with having told the Court that Sobell was "kicked out" as a deportee, whereas in fact, Sobell was not legally deported. Mr. Saypol's statement has been lifted completely out of context; he made that comment when characterizing the contents of Sobell's own affidavit. He stated: "The whole affidavit portrays certainly that this defendant was not honorably escorted from Mexico but that literally he was kicked out as a deportee." That sentence speaks for itself [17] (R. 1598-1599).

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[17] It is also interesting to compare petitioner's present unfounded accusations against the prosecution with the statement by his defense counsel after the jury delivered its verdict. Mr. Kuntz stated: "I want to say to Mr. Saypol as an officer of this court, as one officer to another, I am willing to shake his hand after a job that we both had to do." (R-1583).

CONCLUSION

My consideration of the contentions urged in petitioner's second motion leads me to the conclusion that they are as utterly lacking in merit as are his contentions regarding the Court's lack of jurisdiction.[18]

This petition is so entirely devoid of merit that perhaps it has been unduly dignified by the minute consideration and analysis it has received in this opinion. However, an effort has been made to lay to rest with finality baseless contentions and accusations which have been repeated not primarily to aid the petitioner but rather to embarrass and injure our courts and country.

The ancient writ of habeas corpus—to which Section 2255 is analogous—is one of the basic safeguards of America's freedom. Its purpose is to ensure that no man may be held in confinement in violation of due process of law, and it imposes a strict duty upon all officials connected with the government—state, local or national. But there is an equal duty imposed upon attorneys whose obligation it is to uphold the law, and the dignity and integrity of the courts. It is their duty as officers of the court to ensure that this great writ shall not be stripped of its deep mean-

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[18] In short, I am led to the same conclusion that was reached by my colleague Judge Ryan after he had examined the contentions of all three defendants on their first motion pursuant to Section 2255.

> "I have concluded . . . that the petitioners are entitled to no relief, that the court which rendered judgment had jurisdiction, that the senterces imposed were authorized by law and are not otherwise open to collateral attack on any of the grounds urged by the petitioners, and that full and complete enjoyment of the constitutional rights of petitioners has been extended them and has in no way been denied or infringed." *United States* v. *Rosenberg and Sobell*, 108 F. Supp. 798, 800 (S. D. N. Y.), aff'd 200 F. 2d 266 (C. A. 2, 1952), *cert. denied* 345 U. S. 965, *rehearing denied*, 345 U. S. 1003 (1953).

ing through a corrosive process caused by repeated abuses of its processes. Four lawyers argued these motions for Sobell, California counsel among them, and petitioner also had the services of an expert on Mexican law. The two legal memoranda submitted, which ran to over one hundred pages, and the numerous lengthy affidavits and exhibits indicate that an inordinate amount of time, money, effort and ingenuity was put into this motion on petitioner's behalf. If Sobell were an unlettered prisoner, friendless and without funds, attempting to cry out "unfair", his lengthy and utterly meritless petition might not be such a gross misuse of the judicial processes.

Under the governing rules of law, Sobell has been given the benefit of any doubt. For that reason all his allegations concerning the alleged brutality and illegality of his abduction were assumed to be true for the purposes of these applications. Therefore, I have not considered in this opinion the question of his veracity. But I find it difficult to believe that a man who was seized and blackjacked, as he claims, would not have immediately shouted out this injustice to the world and would have held silent for six months prior to his trial and then throughout the trial, holding back his story as a sort of trump card. Experience dictates that human beings do not re-act that way.

The ease with which the petitioner tars all associated with the prosecution in the face of a clear record which proves the contrary is truly startling. As was recently said of another prisoner who engaged the courts endlessly with meritless petitions, "'He is smart, shrewd and resourceful.' Thus he knows how to make charges so wild . . . as to induce a concern for their refutation that otherwise he would not command." *United States* v. *Tramaglino*, Court of Appeals for the Second Circuit, June 4, 1956.

From petitioner's unfounded attacks against the men who conducted the prosecution of his case, it is obvious

that he believes in the broadside attack, painting with broad stroke and recklessly maligning all who participated in the process of bringing him to justice.[19]

During the course of my deliberations on this matter, as on other matters involved in this case from its inception, there have been many attempts to bring extra-judicial utterances and actions to my attention. Many of these have been designed to influence judicial determination in a way that is alien to our judicial process—and in some instances they constituted a subtle attack upon it. Freedom of speech should and does permit untrammeled discussion and differences of opinion, but judicial impartiality requires that the courts be free from extraneous and conflicting pressures. Therefore, the American judicial system has evolved its own safeguards and procedures for arriving at the truth—procedures which have withstood the test of the centuries. These procedures and safeguards have been the sole guideposts for this Court.

The motions and the files and records of this case show conclusively that the prisoner is entitled to no relief. Motions denied.

Dated: New York, N. Y.,
June 20, 1956.

IRVING R. KAUFMAN,
U. S. D. J.

[19] In this connection, it is interesting to note that the petitioner brands the FBI as an agency of oppression, ignoring its reputation for high standards of fairness. These high standards were recently praised by the Court of Appeals for this Circuit in an opinion by Judge Frank, who is well known for his outspoken attacks on any form of police brutality. See *United States ex rel. Santo Caminito v. Murphy*, 222 F. 2d 698, 703-704 (C. A. 2, 1955).

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IN THE

Supreme Court of the United States

October Term, 1957

No. 440

MORTON SOBELL,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FRANK J. DONNER,
ARTHUR KINOY,
MARSHALL PERLIN,
342 Madison Avenue,
New York, New York,

BENJAMIN DREYFUS,
703 Market Street,
San Francisco, California,

Attorneys for Petitioner.

Of Counsel:

FRANK J. DONNER,
ARTHUR KINOY,
MARSHALL PERLIN,
BENJAMIN DREYFUS,
LUIS SANCHEZ PONTON,
University of Mexico,
Mexico City, Mexico.

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IN THE

Supreme Court of the United States

October Term, 1957

No. .....

MORTON SOBELL,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit which affirmed an order of the United States District Court for the Southern District of New York denying a motion for a hearing pursuant to Title 28, U. S. C., Section 2255.*

Opinions Below

The opinion of the district court denying petitioner's two motions for hearings pursuant to Title 28, U. S. C.,

* The courts below concurrently considered and denied a second motion pursuant to Title 28, U. S. C., Section 2255, for a hearing and, upon the hearing, for an order vacating and setting aside the sentence and judgment of conviction on the ground that violations of the treaty of extradition between the United States and Mexico deprived the former and its domestic courts of national jurisdiction to try petitioner and impose sentence. This motion is the subject of a companion petition for writ of certiorari filed herewith.

Section 2255 is reported at 142 F. Supp. 515 and appears in the record at A. 197.*

The opinion of the court below is reported at 244 F. 2d 520, and is attached hereto as Appendix II.

Jurisdiction

The judgment of the Court of Appeals was entered on May 14, 1957 (Appendix I). A petition for rehearing was denied on June 3, 1957. On August 28, 1957, the time for filing petitions for writ of certiorari herein was extended to and including September 10, 1957, by order of Mr. Justice Harlan. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. 1254 (1).

Questions Presented

Petitioner moved for a hearing pursuant to Title 28, U. S. C., Section 2255, charging that his conviction had been fraudulently contrived in that the prosecution knowingly, wilfully and intentionally used false evidence and perjured testimony to establish that petitioner had been deported or otherwise ousted by the Government of Mexico, when, in truth and fact, it was the prosecution, acting through its agents in the United States and Mexico, who had kidnapped petitioner from that country without the knowledge or con-

* We designate with the letter "A" references to the current record on appeal. The printed record of the original trial is referred to as "R". Attached to this petition are five appendices, designated by Roman numerals, containing respectively the judgment of the court below, the opinion, the papers on the motion to amend the record on appeal, petitioner's affidavit in support of the motion in arrest of judgment, and excerpts from the prosecution's brief in the original appeal to the Court of Appeals. In addition, photostatic copies of the Exhibits and Appendices A to D attached to the motion have been filed with the Court.

sent of any Mexican governmental authority. To shield this fraud from judicial scrutiny, the prosecution not only suppressed the facts which would have refuted the false evidence and exposed its role in petitioner's seizure, but also made false representations to both the trial and appellate courts.

Respondent has not denied the facts set forth in the moving papers, but relies upon the files and records of the case. Petitioner's motion was denied without a hearing.

The questions presented are:

1. Whether, upon the files and records of this case and the moving papers, petitioner's motion should have been denied without a hearing.

2. Whether the lower court denied due process to petitioner in disregard of Section 2255 and the rules governing habeas corpus proceedings by rejecting, without a hearing, the allegations of the petition and concluding that the Mexican Government had deported and was responsible for petitioner's removal from that country.

3. Whether the lower court should have granted petitioner's motion to amend the record to include, or remanded the case for the district court to consider a certificate of the Secretariat of *Gobernacion* of the Government of Mexico, received after argument of the appeal but prior to decision, attesting to the absence of any expulsion or deportation order against petitioner.

4. Whether petitioner's motion in arrest of judgment, challenging the trial court's jurisdiction over his person and requesting a hearing to obtain facts relating to his seizure in Mexico, is a bar to a motion pursuant to Section 2255, upon evidence subsequently acquired, charging that the prosecution had fraudulently contrived his conviction by the knowing use of false evidence relating to petitioner's removal from Mexico.

5. Whether, under the circumsta..ces of this case, petitioner has waived the right collaterally to attack his conviction on the grornd that the prosecution knowingly, wilfully and intentionally used such false evidence and perjured testimony.

Statute Involved

Title 28, U. S. C., Section 2255 provides:

§ 2255. *Federal custody: remedies on motion attacking sentence.*

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

Statement of the Case

A. Summary of the Proceedings

On January 31, 1951, an indictment was returned against petitioner charging in a single count that he had conspired to transmit to the Union of Soviet Socialist Republics "documents, writings, sketches, notes and information relating to the national defense of the United States" in violation of Title 50, U. S. C., Section 34 (R. 2).

Petitioner was tried and convicted together with co-defendants Julius and Ethel Rosenberg. On April 5, 1951, a sentence of thirty years was imposed upon petitioner (R. 30). On February 25, 1952, the Court of Appeals affirmed the judgment of conviction, Judge Frank dissenting. 195 F. 2d 583.*

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* 195 F. 2d at 601: "The writer of this opinion disagrees. He thinks that there was error, in this respect, which requires that Sobell be given a new trial. The balance of this paragraph sets out the writer's reasons for dissenting on this issue. Even if Sobell, on Elitcher's testimony, could reasonably be held as a member of the Rosenberg-Gold-Greenglass conspiracy, the question of his membership should have been submitted to the jury. Elitcher's testimony would have supported either of two inferences, i.e., that Sobell agreed only (1) to transmit certain kinds of military information to Russia or (2) that he agreed with the other conspirators to transmit 'any military information of all kinds.' The jury should have had the opportunity to choose between the inferences and to decide whether he actually joined the larger conspiracy."

A petition for writ of certiorari to this Court was denied on October 13, 1952, Mr. Justice Black noting his opinion that the petition should have been granted. 344 U. S. 838. On November 17, 1952, a petition for rehearing was denied, Mr. Justice Black adhering to his view that the petition for certiorari should have been granted. 344 U. S. 889; see also memorandum filed by Mr. Justice Frankfurter in the petition for rehearing in the companion case of *Rosenberg* v. *United States*, 344 U. S. 889. Accordingly, this Court never reviewed the record and never affirmed the fairness of petitioner's trial below. 346 U. S. 273, 301.

Petitioner is presently detained in the United States Penitentiary at Alcatraz, California, and has been in federal custody since August, 1950.

On May 8, 1956, the petitioner, pursuant to Title 28, U. S. C., Section 2255, moved for a hearing and, upon the hearing, for an order vacating and setting aside the sentence and judgment of conviction on the grounds that his conviction was unjustly and illegally procured in violation of the Constitution and laws of the United States. In this motion, petitioner charged that his conviction was fraudulently contrived in that the prosecution knowingly, wilfully and intentionally utilized false evidence and perjured testimony, deliberately suppressed evidence which would have exposed its fraud, and made false representations to the trial and appellate courts in an effort to conceal the original fraud (A. 7).

The Government failed to controvert any of the allegations of fact contained in the motion. Over petitioner's opposition, both this and the companion motion were referred to Judge Irving R. Kaufman, who presided at the original trial. After oral argument on June 4, 1956 (A. 111), the district court denied both motions without a hearing. On April 26, 1957, the Court of Appeals denied a motion of petitioner to amend the record on appeal to in-

clude an official statement by the Secretariat of *Gobernacion* of the Government of Mexico, received by counsel for petitioner subsequent to the argument before the Court of Appeals but prior to decision (Appendix III, *infra*). On May 14, 1957, the Court of Appeals for the Second Circuit in an opinion by Circuit Judge Medina affirmed the order of the district court denying the two motions for hearings.

B. The Facts and Issues Involved in the Original Trial and Appeal

The trial. Only one witness, Max Elitcher, attempted to associate petitioner with the alleged conspiracy. He was an admitted perjurer (R. 278-282, 369) and a claimed co-conspirator who was testifying with dubious intent and motive. The remainder of the case against petitioner was limited to an attempt to establish his guilty consciousness by proving he had fled to Mexico, with no intention of returning to the United States (A. 16).

The prosecution sought to show that petitioner, acting in accordance with a preconceived plan of the conspiracy, fled from the United States to Mexico to avoid apprehension by the federal authorities. To establish that petitioner's trip to Mexico was for the purpose of flight and to avoid prosecution, the Government attempted to prove that he was returned against his will by the Government of Mexico and handed over to the United States authorities (A. 13-19). To this end, the prosecution offered evidence to prove that petitioner was legally deported by the Government of Mexico (A. 11-13). This evidence of deportation as the district court pointed out, was the "natural capstone" of the flight evidence (A. 218).

The prosecution sought to prove petitioner's deportation by the Government of Mexico through two witnesses and Government Exhibits 25 and 25-A.

In the course of his direct examination of the witness Manuel Giner de los Rios (a neighbor of petitioner in Mex-

ico City), Roy Cohn, the assistant prosecutor, asked "what date Sobell was deported to the United States by the authorities" (R. 926). Defense counsel objected on the ground that the witness was not qualified to establish action by the Mexican authorities. Mr. Cohn replied, "Of course, your Honor, I am asking a question. I think we have other proof coming." In reply to the court's question, "You have other proof coming of deportation?", Mr. Cohn answered affirmatively (R. 926).

Shortly thereafter, Mr. Cohn tendered Government Exhibit 25, purportedly a true copy of a manifest made in the regular course of business by the Laredo, Texas, office of the Immigration and Naturalization Service, which contained on its face a notation that petitioner had been "Deported from Mexico" (R. 1031). Mr. Cohn tendered this exhibit as proof of "the circumstances of the departure of Sobell from Mexico to the United States" (R. 938).

Defense counsel objected to the document on the ground that an entry made by an employee of the United States did not constitute competent proof of governmental action by a foreign power (R. 940). The court directed, over Mr. Cohn's objection, that he produce the maker of the document to authenticate it.

The following day, March 21, 1951, James S. Huggins, immigration inspector of the Immigration and Naturalization Service of the Department of Justice, was produced, after being flown from his station in Laredo, Texas. Mr. Huggins' direct testimony consisted solely of the facts that he had prepared Government Exhibit 25-A in the regular course of his duties as a Government employee (R. 1025), and that petitioner was brought into his office by Mexican Security Police (R. 1030). The prosecution studiously avoided asking him anything concerning the circumstances of petitioner's removal, but merely used his testimony to authenticate the document.

On *voir dire* and cross-examination, Huggins stated:

1. The notation "Deported from Mexico" was based on his own information and observation (R. 1027, 1028) and was not supplied by the persons who delivered petitioner to Laredo, Texas (R. 1028, 1036).

2. Petitioner was delivered to him by officials from Mexico acting in their "official capacity" (R. 1026).

3. He had been awaiting petitioner's arrival (R. 1034-1035).

4. He advised petitioner that the manifest must be signed because "our regulations require that any person who is being deported from Mexico there be a record made • • •" (R. 1036).

The trial court in the charge characterized the evidence as proof that petitioner would not have returned except for the action of the Mexican government. He stated that the jury could consider petitioner's trip to Mexico and his return by the Mexican authorities as proof of (1) guilty flight and (2) independent proof of petitioner's membership in the Rosenberg-Greenglass conspiracy, charging:

> "• • • The prosecution says that when the conspiracy was uncovered • • • the defendants, fearful of being apprehended, attempted to flee and that their attempts to flee followed a pattern which also indicates a preconceived plan • • • *and that he [petitioner] was apprehended only after being delivered to the United States by the Mexican authorities.* • • • "You may consider whether such journeys or trips show a preconceived plan as part of the conspiracy • • •" (R. 1559-1560; emphasis supplied).

The motion in arrest of judgment. On the day of sentencing, petitioner submitted an affidavit in support of a

motion in arrest of judgment challenging the jurisdiction of the court over his person (R. 31-33; attached as Appendix IV hereto). Petitioner's affidavit confined itself to a physical description of his seizure on August 16, 1950, and transportation to Laredo, Texas. He stated that he was seized at his residence in Mexico City by persons claiming to be police, on the pretext that he was wanted for robbing a bank in Acapulco. His personal effects, including his "visa", were taken from him. He was denied an opportunity to communicate with the United States Embassy, assaulted and rendered unconscious, and removed to a building where he was held from approximately 8 o'clock in the evening until 4 o'clock the next morning. At that time he and his family were placed in cars under guard and transported to Nuevo Laredo. Upon approaching the International Bridge, a United States agent entered the car and brought petitioner to Laredo, Texas, where he was directed to sign a card and was subsequently placed in custody.

Petitioner, lacking essential information about the circumstances of his removal, requested that a hearing be held to determine whether it had been lawful (R. 1598).

The prosecutor, Irving Saypol, argued that the affidavit was false and should be disregarded (R. 1598-1599):

> "This very affidavit contains a falsehood in the statement that there was exhibited amongst other things to the Mexican authorities visas. Counsel ought to know that his client never went into Mexico with a visa. * * * It is evident in the fact that throughout this trial there sat in this courtroom the wife of the defendant as to whom the affidavit states that she was present and we knew that she was present from the time of the arrest until the time the *final act of deportation was effected at Laredo* * * *.
>
> "The Court: I think I have enough.

"Mr. Saypol: The whole affidavit portrays certainly that this defendant was not honorably escorted from Mexico but that *literally he was kicked out as a deportee.*" (Emphasis supplied.)

The trial court summarily denied without opinion petitioner's motion in arrest of judgment.

The original appeal. On the appeal from the original judgment of conviction petitioner urged the Court of Appeals to reverse the conviction on the grounds, *inter alia,* that (1) the testimony of deportation from Mexico and Government Exhibit 25-A were irrelevant, immaterial and incompetent; and (2) it was error for the lower court to deny petitioner a hearing on his motion challenging the jurisdiction of the trial court over his person.

The prosecution in its brief to that court urged the relevancy and materiality of the deportation evidence.* The prosecution further argued that the evidence established that petitioner had been legally deported by the Government of Mexico. It declared that there was no evidence of illegality in petitioner's removal nor unlawful instigation or participation on the part of the prosecution or its agents.**

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* "Thus, proof that his return was involuntary, in conjunction with proof of his activities in Mexico, tended strongly to show that his trip to Mexico was prompted by a desire to escape prosecution. As such it was persuasive evidence of his consciousness of guilt." (Government's Brief, p. 66).

** The pertinent sections of the prosecution's brief are set forth in Appendix V, *infra.* The prosecution stated in part (Appendix V, pages 29a-31a):

"While kidnapping may be a criminal offense in Mexico, summary deportation of a fugitive from justice is hardly tantamount to kidnapping. [Footnote:] Even if it is true, as Sobell alleges,

In affirming petitioner's conviction, the Court of Appeals, relying upon the record below and the representations of the prosecution, held that the evidence of deportation was highly relevant and established that petitioner was legally deported by the Government of Mexico.*

The original petition for writ of certiorari. In response to the original petition for writ of certiorari to this Court, the prosecution, in a more guarded but equally

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that he was beaten by the Mexican police, such mistreatment would hardly invalidate his deportation."

* * *

"Surely, a fugitive from justice who is willingly surrendered by the country of his asylum to the country where he is wanted derives no immunity from prosecution by reason of the latter's request for his surrender."

* * *

"There is not a shred of evidence that any United States agent assisted the Mexicans in this act. Nor is there anything in the record to indicate that the United States Government procured the Mexican Government to deport Sobell. The most that appears is that the FBI was waiting for Sobell in Laredo when he was delivered by Mexico into the hands of the United States Immigration Service. From this it may be inferred that the Mexican authorities had alerted the FBI to expect Sobell's arrival, but it by no means follows that the Bureau was the instigator of Sobell's ouster."

* * *

"For even if the rule were as Sobell would like it, he would not be in a position to invoke it, since it presupposes wrongful conduct on the part of a federal officer, and there is not a scintilla of evidence of any such conduct here."

* Thus the Court of Appeals stated in its opinion (195 F. 2d at 603):

"* * * the Government introduced evidence to show that Sobell had been legally deported from Mexico * * *."

and further (at 603, footnote 20):

"It seems particularly inconsistent, therefore, for Sobell not to have introduced evidence, during the trial, of his kidnapping to contradict the Government's evidence of legal deportation."

insistent fashion, continued to vouch for the evidence of deportation by the Mexican Government. It argued to this Court that the evidence of deportation was competent and that the "inspector who made the entry testified that he was under a duty to do so in the case of every deportee from Mexico (R. 1027, 1036)".* More than this the prosecution maintained its position that petitioner's removal was to be attributed solely to the Mexican Government.**

C. The Facts and Issues Involved in the Present Motion

The main allegations of the motion which establish the tainted character of the conviction are based on facts only recently obtained by petitioner and therefore not included in the affidavit submitted in support of the motion in arrest of judgment. These are the allegations which demonstrate for the first time that petitioner was not deported or expelled by the Government of Mexico.† Petitioner's factual

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* Government's opposition to petition for writ of certiorari at page 51:

"The inspector who made the entry testified that he was under a duty to do so in the case of every deportee from Mexico (R. 1027, 1036), and that he made the entry in the regular course of his duties on the basis of personal observation, as was his custom in cases of similar character (R. 1027). Thus, the trial court correctly admitted the entry under the business entry statute. 28 U. S. C. 1732."

** Government's opposition to petition for writ of certiorari at page 42:

"It is clear also that even if Mexico summarily expelled Sobell, it has not been shown that its action was unlawful. Consequently, even if the United States requested such expulsion, he cannot complain."

† This newly obtained evidence is the result of field investigations in Mexico by American and Mexican counsel which took more than a year to complete.

allegations are undenied. For the purpose of determining whether a hearing should have been granted, the facts alleged in the motion will be deemed to be true. *Chessman* v. *Teets*, 350 U. S. 3, 4.

Petitioner's charge that his conviction was fraudulently contrived is grounded upon a fundamental, uncontroverted fact. He was not deported or expelled by the Government of Mexico. He was abducted by agents of the prosecution and Government of the United States without the knowledge, participation or consent of the Mexican governmental authorities.

The motion does not rest upon this direct assertion or conclusion alone. It contains the most detailed factual allegations in support of its ultimate conclusion.*

Thus, the motion incorporates a statement from the Nuevo Laredo office of the Department of Immigration of the Secretariat of *Gobernacion*, denying petitioner's deportation through that city (Exs. 12, 13). Further, following the argument in the Court of Appeals, petitioner submitted an official statement from the Mexican Government establishing that it had nothing to do with his removal. The statement was issued by the Secretariat of *Gobernacion* of the Government of Mexico, the department solely responsible in this area and whose files would reflect any removal of an alien by deportation expulsion or otherwise. This department authoritatively stated that "in the files pertaining to Morton Sobell, United States citizen, there is no record to the effect that this department has ordered his expulsion from the country" (Appendix III, p. 18a). Petitioner moved to amend the record to include this document, but the court below without opinion or comment de-

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* We are confident that this Court will recognize that the allegations in this petition are far more specific than those in many cases in which this Court has ordered a hearing. Compare *Pyle* v. *Kansas*, 317 U. S. 213.

nied his motion. Thus, the official files and records of the Mexican Government, including the records of the Department of Immigration in Mexico City as well as the records of the port of exit, Nuevo Laredo, establish that the Government of Mexico neither deported nor expelled petitioner.

As additional proof of the lack of Mexican governmental participation in petitioner's removal, the motion pointed to its variance from the regular and established deportation procedures followed by Mexico internally and in relation to the United States (A. 25-26, 37-38).*

But petitioner did not merely set forth the total absence of any action by the Government of Mexico. He charged that the prosecution itself, through its agents in the United States and Mexico, initiated and executed his abduction. He was seized in a secret and conspiratorial fashion so as to prevent knowledge or interference by the Government of Mexico until he had been carried beyond its borders. This charge is also supported by extensive factual allegations.

Petitioner and his family left the United States for a trip to Mexico on June 22, 1950 (A. 21). Prior to departure they had obtained tourist cards from the Mexican Consulate in New York City. Travelling by air, they stopped at Dallas, Texas, where petitioner registered certain personal effects with the United States Customs officials to avoid customs duties on his planned return (A. 21, Exs. 3, 4 and 5). All this was done under his own name and not in a surreptitious manner. In going to Mexico, petitioner did not seek to avoid prosecution or apprehen-

* In setting forth these facts we do not here mean to raise the legal effect of a failure of the Mexican Government to comply with its internal law, nor is the issue that petitioner was removed without requisite formality or adjudicative process. These facts are set forth merely to establish that no Mexican authority was responsible for petitioner's removal.

sion, nor was his trip in any way related to a purported involvement in criminal activities. The authorities had not evidenced any desire to interview, let alone apprehend, him, nor was he aware of any reason why they should (A. 16).

In Mexico City petitioner rented in his own name an apartment for himself and his family. He carried on his person numerous documents accurately reflecting his identity. Petitioner planned to and would have voluntarily returned to the United States had he not been prevented from doing so by his seizure (A. 21-22, Exs. 7, 8, 9, 10, 11).*

Petitioner's seizure was conceived, directed and participated in by agents and representatives of the prosecution and of the United States Government. The Federal Bureau of Investigation, at the direction of the prosecution, used its contacts in Mexico to devise a scheme to kidnap petitioner without the knowledge of the Mexican Govern-

* There was testimony that petitioner after openly residing in Mexico a month, used aliases for a period of about ten days during which time he travelled to Vera Cruz and Tampico. In this short period he contemplated leaving for Europe or South America. The temporary desire to leave Mexico was impelled by the fact that he had learned of the arrest of Julius Rosenberg, a college classmate of his, with whom he had engaged in left-wing activities during their student days. Because of his continued social relationship with the Rosenbergs and the anti-Communist hysteria and prosecutions in the United States, he felt that he, too, might become an innocent victim of persecution. His exaggerated fears resulted in a temporary loss of good judgment. He soon recognized this, and by August 1, 1950, he had returned to Mexico City where he continued to reside openly with his family until his abduction on August 16. At that time he and his family were making plans to return to the United States.

This testimony was itself the fruit of the illegal seizure of petitioner and search of his person and premises by agents of the prosecution. Prior to petitioner's abduction, the prosecution had no knowledge of his travels in Mexico or his use of aliases. See Paragraph 9, *infra*.

ment (A. 36).* It recruited individuals in the employ of the Secret Police of the Federal District of Mexico to collaborate with American agents in seizing petitioner and bringing him to the United States (A. 27, 28, 34-36). These policemen did not participate in petitioner's seizure in behalf or with the knowledge of any Mexican authority, but solely as agents of the prosecution.**

On August 16, 1950, petitioner and his family had returned to their apartment from a picnic. As they were completing their supper, three Mexicans in civilian clothes, agents of the prosecution, who identified themselves as police officers, entered and seized petitioner. They said he was "Johnny Jones" and was wanted for robbing a bank in Acapulco. Petitioner stated that he was Morton Sobell. He fruitlessly demanded an opportunity to call the United States Embassy to prove his identity and obtain protection. The kidnappers seized the credentials he offered to establish his identity. Finally, petitioner was forcibly carried away (A. 22).

Earlier that day, American and Mexican agents of the prosecution had gone to petitioner's apartment house to discover his exact location. Neighbors were told that petitioner was wanted in the United States on a charge of kidnapping a child (A. 28-29).

Another circumstance corroborates the American inspiration and control of the abduction. Several hours after

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* The FBI has, in some instances without the consent or knowledge of the country involved, stationed its agents in various American nations and established unofficial relations with nationals (A. 36). See also Don Whitehead, *The FBI Story* (1956), pp. 210-230.

** The jurisdiction of this local police agency is, in fact, limited to the Federal District of Mexico, whose geographical boundaries are essentially those of Mexico City. They have no power to act beyond these boundaries, nor are they authorized to act in any way in immigration matters (Appendix D). They are analogous to plainclothesmen of the District of Columbia Police Department.

the kidnapping, petitioner's domestic worker, Senora De Soto, was told by one of the abductors that they were acting as agents and representatives of the United States Government (A. 29).*

The prosecution's intimate connection with the abduction is further demonstrated by the fact that within approximately two days of the kidnapping, some of petitioner's abductors returned to the house in the company of an FBI agent and interviewed Government witness Rios and his wife (A. 30). Within a period of ten days following the kidnapping, Rios was seen by the FBI on three occasions and at least in one instance was taken to the United States Embassy for interrogation.**

About a month after the kidnapping, Senor Rios was visited at his place of business in Mexico City by prosecutors Roy Cohn and Irving Saypol and an FBI agent (A. 30).***

Since the prosecution initiated, organized and participated in petitioner's abduction, it of course knew that evidence purporting to show deportation by the Government of Mexico was false and perjurious.

But beyond any mere inference from these facts, the prosecution and its witness Huggins had direct notice

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* In removing the personal effects of petitioner and his family from their apartment, the agents took this woman's belongings also. She was advised that her possessions were being held by the United States Embassy and that she should go there to obtain them (A. 29-30).

** The Mexican Government does not sanction FBI investigations on its soil (A. 36).

*** The petition points to the circumstances surrounding petitioner's delivery to the FBI at Laredo, Texas, as further proof that the prosecution directed his abduction. At every stage of the action, the movements and activities of the American and Mexican agents of the prosecution were completely coordinated (A. 31-32).

long before the trial that petitioner was not deported by the Government of Mexico.

Upon learning from United States news reports of petitioner's kidnapping, the Mexican Government instituted an investigation in Laredo and Nuevo Laredo and took certain steps to prevent a repetition of such an unlawful invasion of its national sovereignty (A. 25).

Within a day of petitioner's arrival in Laredo, Huggins and other employees of the United States Immigration Service were advised by Hector Rangel Obregon, Chancellor of the Mexican Consulate at Laredo, that petitioner had not been deported. Senor Obregon expressed concern that the seizure and removal had occurred without the knowledge or approval of the Government of Mexico (A. 27).*

This information was immediately transmitted to the prosecution. At the very time Huggins was so informed by the Mexican consulate, FBI agents John W. Lewis (who sat at the prosecutor's table throughout the trial), Rex I. Shroder and Leo H. Frutkin of the New York staff were in Laredo, Texas, in connection with the case (A. 27-28). Finally, petitioner alleged that Mexico sent a report of the abduction to its Embassy in Washington, which in turn made representations on the matter to the United States Government (A. 38). Subsequent to the filing of the motion and while the case was pending on appeal, petitioner received an official declaration from the

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* Even before this notification, Huggins, as an experienced immigration officer, must have been well aware that petitioner's removal from Mexico was not a deportation by governmental action. As the motion points out (A. 37-38), petitioner was put over the frontier at three o'clock in the morning unaccompanied by Mexican immigration officers and without any of the necessary documents furnished to all deportees prior to leaving Mexico. This was hardly the regular course of business. See Exhibit 14a-m, attached to motion.

Secretariat of *Gobernacion* of the Government of Mexico, stating that "in the files pertaining to Morton Sobell, United States citizen, there is no record to the effect that this department has ordered his expulsion from the country" (Appendix III, p. 18a).

None of these facts have been controverted. In this posture of the case, the following conclusions must be drawn:

1. The prosecution knew that petitioner was abducted from the territory of Mexico without the knowledge or consent of the Mexican Government. It was the prosecution itself which had planned, directed and participated in petitioner's abduction.

2. Long prior to the trial, the prosecution and the witness Huggins were informed by official representatives of the Government of Mexico that petitioner had not been deported and that the Mexican Government had not in any way consented to or participated in petitioner's removal.

3. Nevertheless, the prosecution fraudulently attributed its unlawful seizure to the Government of Mexico by knowingly, wilfully and intentionally utilizing a false document, Government Exhibits 25 and 25A, and the perjured testimony of Huggins, to establish that petitioner had been legally deported by the Government of Mexico.

4. In order to protect this fraud and further mislead the court, defense and jury, the prosecution suppressed evidence in its possession which would have disclosed the falsity of the evidence offered.

5. Finally, in its effort to hide the fraud and to prevent a judicial inquiry into the true facts, the prosecution made false representations to the trial and appellate courts by continuing to insist that petitioner's removal was an act of lawful deportation by the constituted authorities of the Government of Mexico.

The fraud charged by petitioner and uncontroverted by the Government was the almost inevitable result of the illegal seizure of petitioner in Mexico by agents of the United States. The weakness of its case against petitioner forced the prosecution to rely on the theory of conspiratorial flight. But the use of this evidence to that end created a dangerous dilemma. If the true facts concerning the abduction became known, it is doubtful whether, under the doctrine of *McNabb* v. *United States*, 318 U. S. 332, such evidence of "involuntary return" would have been admissible.* The other evidence purporting to show flight would likewise have been inadmissible, as the fruit of an illegal search and seizure. Moreover, petitioner's seizure by the prosecution without the consent of the Mexican Government, if known, would have raised the most serious questions of personal and national jurisdiction.**

Legal impediment was thus transformed into legal advantage. An abduction by agents of the prosecution became an act of deportation by the Mexican Government. The testimony that petitioner was "deported" by Mexico not only saved the "flight" evidence and hid the jurisdictional defects: It affirmatively implied to the jury an adjudication by Mexico of petitioner's guilt and misconduct. The difficulty faced by petitioner in obtaining facts concerning events in a foreign country and matters usually confined to diplomatic channels served to immunize the fraud from detection.

To contrive an act of legal deportation by the Mexican Government out of a lawless abduction required more than skill. It required a confidence that the emotional currents which swirled around this case at the height of the Korean War would hide the nature of the fraud from judicial scrutiny.

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* See Paragraph 9, *infra*.

** See companion petition for writ of certiorari.

Reasons for Granting the Writ

1. The decisions of the lower courts in denying petitioner's request for a hearing constitute such a departure from the almost universally accepted standards in habeas corpus and Section 2255 proceedings as to require this Court to exercise its power of supervision. These decisions not only disregard the issues and facts posed in the present motion, but they leave unchallenged conduct of our law-enforcement authorities which has important consequences for the administration of the criminal law.

Judicial evaluation of the fairness of petitioner's original trial was inextricably intertwined with the fate of his two co-defendants. The heightened emotions of that period and the case itself precluded the type of review which today, in a calmer and less troubled time, is available. Compare dissenting opinions of Justices Black, Douglas and Frankfurter in *Rosenberg* v. *United States*, 346 U. S. 273, 289, 296, 301, 310. A reconsideration of the fairness of the original trial in respect to petitioner's two co-defendants has, as Mr. Justice Frankfurter pointed out, "the appearance of pathetic futility." 346 U. S. at 310. But as the Justice also reminded us, "Perfection may not be demanded of law, but the capacity to counteract inevitable, though rare, frailties is the mark of a civilized legal mechanism." 346 U. S. at 310. To deprive this petitioner of an opportunity to prove his admittedly serious charges which, if true, would invalidate the trial, cannot be justified. Our system of law and justice must be able to rise above the turbulent passions of a partisan moment and administer justice in a spirit of "sturdy self-examination and self-criticism."

For as Lord Mansfield said in *Rex* v. *Wilkes*, 4 Burr., 2527, at 2561-2562: "The constitution does not allow reasons of state to influence our judgments: God forbid it should! We must not regard political consequences; how

formidable soever they might be * * *. We are to say, what we take the law to be: if we do not speak our real opinions, we prevaricate with God and our own consciences."

2. It is of the essence of the great writ that such serious charges of fraud whenever discovered be aired in open court and that injustices of a former day shall not forever be entombed behind the walls of the finality of judgments.* Thus, this Court has scrupulously enforced the mandate of the Constitution that a conviction fraudulently contrived is inconsistent with the rudimentary demands of justice. *Mooney* v. *Holohan*, 294 U. S. 103; *Pyle* v. *Kansas*, 317 U. S. 213; *Hysler* v. *Florida*, 315 U. S. 411; *Chessman* v. *Teets*, 350 U. S. 3.**

As Mr. Justice Frankfurter stated in *Hysler*, "The guides for decision are clear": where petitioner makes out allegations which charge that a conviction was fraudulently contrived, the application may not be summarily dismissed. A hearing must be granted. *Chessman* v. *Teets*, 350 U. S. 3. The requirements of the due process clause must be respected "no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be after guilt has been established in accordance with the procedure demanded by the

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* Title 28, U. S. C., Section 2255, under which this petition is brought, affords to a federal prisoner the identical rights as were formerly available by writ of habeas corpus. *United States* v. *Morgan*, 346 U. S. 502.

** See also *Brown* v. *Mississippi*, 297 U. S. 278; *Ex parte Hawk*, 321 U. S. 114; *White* v. *Ragen*, 324 U. S. 760; *Hawk* v. *Olson*, 326 U. S. 271; *Shelley* v. *Kraemer*, 334 U. S. 1; *Burke* v. *Georgia*, 338 U. S. 941; *United States* v. *Hayman*, 342 U. S. 205. Cf. *Mesarosh* v. *United States*, 352 U. S. 1. The rule of *Mooney* v. *Holohan*, *supra*, applies, of course, to the knowing use of perjured testimony in a federal court as well as in a state court. See, for example, *Ryles* v. *United States*, 198 F. 2d 199 (C. A. 10); *Casebeer* v. *Hudspeth*, 121 F. 2d 914 (C. A. 10); *United States* v. *Kaplan*, 101 F. Supp. 7 (D. C. N. Y.).

Constitution." For, as Mr. Justice Harlan stated, "The proponent before the Court is not the petitioner but the Constitution of the United States." *Chessman* v. *Teets*, — U. S. —, 77 S. Ct. 1127, 1132.

If the principles underlying the writ required a reversal in *Chessman*, after the full appellate review afforded defendant on his original conviction by the highest court of the State of California (see appendix to opinion of Mr. Justice Douglas in *Chessman* v. *Teets*, *supra*, 77 S. Ct. at 1136), it is even more necessary that this petitioner be afforded a day in court on his charges. Unlike *Chessman*, the original record of this petitioner's conviction was never reviewed by the highest court to which appeal was possible. *Rosenberg* v. *United States*, *supra*, at 300. This Court will be "deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands" *Chessman* v. *Teets*, *supra*, 77 S. Ct. at 1132.

3. The rules applicable to habeas corpus proceedings, which guarantee that this instrument of judicial correction will not be deprived of meaning and power, are clear and simple, and hardly need extensive citation of authority:

(a) A district court is required to grant a hearing unless, in the words of the statute, "the motion and files and records of the case conclusively show that the prisoner is entitled to no relief." *

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* The district court enunciated the standard it used in appraising the allegations of petitioner's motion as follows:

> "In passing on these motions, therefore, the court is required to accept all of petitioner's averments as true insofar as they are not inconsistent with the record" (A. 203).

This standard does not accord with the mandate of Section 2255. The lower court significantly failed to state that findings adverse to petitioner must be conclusively established by the files and records.

(b) All allegations of the petition not conclusively refuted by the record must be accepted as true in determining its legal and factual sufficiency.

(c) Where a petition raises a factual issue outside the record, a hearing must be granted and the prisoner must be afforded an opportunity to prove his allegations.*

But the lower courts failed to give effect to these fundamental principles and ignored or refused to consider as true the new and detailed facts upon which petitioner seeks relief. The courts rejected these principles in favor of their own evaluation of the evidence presented, as if a hearing had already been held. It is almost impossible to ascertain from the opinions below that the sole issue is whether, upon the showing made, petitioner was entitled to an opportunity to prove his charges.

The Government is obviously acquainted with all the facts of petitioner's removal from Mexico. It knows whether Mexico expelled petitioner or the prosecution kidnapped him. But it has studiously avoided giving its version of what occurred in a sworn statement. Rather it has used its briefs and oral argument to improvise varying hypotheses of what transpired (A. 149, 157). We believe that the Govern-

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In every collateral attack charging knowing use of perjured testimony, the allegations based upon extrinsic evidence must be "inconsistent" with the files and records of the case. So, in the instant case, the new evidence establishing the knowing use of perjured evidence of "legal deportation" is "inconsistent with the record". For this reason, the record cannot be relied on to resolve the issue. See *Davis* v. *United States*, 210 F. 2d 118 (C. A. 8); *Michener* v. *United States*, 177 F. 2d 422 (C. A. 8); *Barrett* v. *Hunter*, 180 F. 2d 510 (C. A. 10), cert. denied 340 U. S. 897; *Sanders* v. *United States*, 205 F. 2d 399 (C. A. 5); *United States* v. *Rutkin*, 212 F. 2d 641 (C. A. 3).

* Upon the remand of this proceeding, the district court should be directed to require petitioner's presence at the hearing. Petitioner's relation to the events in Mexico and the issue posed by the lower court as to his knowledge of the circumstances of his removal, make his presence vitally necessary. See *United States* v. *Hayman*, *supra*, at 223.

ment of the United States cannot ignore our grave allegations merely because it seeks to avoid a hearing. Even lesser charges should not be disposed of with tactical evasions that would convert a proceeding of this kind into a game of hare and hounds.

The lower courts removed the Government's burden of responding by resolving all issues of fact without a hearing and adversely to petitioner. This fundamental error of the lower courts itself constitutes a denial of due process. *Brown* v. *Mississippi*, 297 U. S. 278.

4. The gravamen of the opinion of the lower court is its finding that "there was no perjury" (Appendix II, p. 7a). It decided without a hearing that "appellant was nonetheless deported and the witness [Huggins] did no more than testify to what he personally observed, or was told by appellant, and noted in the manifest in the regular course of his official duties" (Appendix II, p. 7a). The court accordingly concluded, "It is nothing short of absurd to characterize this as wilful perjury deliberately foisted on the trial court by the prosecution. There was no perjury" (Appendix II, p. 7a).

But the lower court could arrive at this conclusion only by totally ignoring petitioner's charges. By what legal process could the Court of Appeals conclude in this proceeding that "appellant was nonetheless deported"? Petitioner has charged in the greatest detail that he was not deported or in any manner expelled by the Government of Mexico; that in fact he was abducted by agents of the prosecution without the participation, knowledge or consent of the Government of Mexico. The Court of Appeals could not ignore these allegations merely because it deemed them distasteful or incredible. Compare *Chessman* v. *Teets, supra.* See *Walker* v. *Johnston*, 312 U. S. 275; *Waley* v. *Johnston*, 316 U. S. 101; *Martin* v. *United States*, 199 F. 2d 279 (C. A. 8); *Smith* v. *United States*, 223

F. 2d 750 (C. A. 5).* The truth will be ascertained in the full light of a judicial hearing and not as a result of the *ex parte* determination of an appellate court. This is the elementary command of Section 2255 and the due process clause.

In finding that Huggins "did no more than testify to what he personally observed", the Court of Appeals utterly ignored the specific charge that within a day after petitioner's arrival in Laredo, Texas, Huggins himself, as well as other employees of the Immigration Service, were personally advised by Senor Hector Rangel Obregon, the Chancellor of the Mexican Consulate at Laredo, that petitioner had not been deported (A. 27).

More than this, Huggins was explicitly informed by Senor Obregon that the abduction had taken place without the knowledge or approval of the Mexican Government (A. 27). Three agents of the Federal Bureau of Investigation were present in Laredo, Texas, when Huggins was so informed (A. 27-28), and one of these agents was present at the prosecution's table throughout the trial (A. 28).

Thus, in August, 1950, the witness Huggins, in the presence of agents of the prosecution, was told by a representative of the Government of Mexico that petitioner's seizure had occurred without the knowledge or approval of that Government. Yet, in March, 1951, seven months after being apprised of the true facts, Huggins testified in court that the individuals who handed petitioner over to him were "Mexican authorities" acting "in an official capacity" (R. 1026). And while Huggins was so testifying, the rep-

* Petitioner's charge of kidnapping by agents of the United States Government cannot be dismissed as utterly improbable in light of the many instances of abduction from foreign territory by officials and private individuals of this and other countries recorded in the annals of diplomacy. See companion petition for writ of certiorari. The temptation to evade the rigorous requirements of extradition treaties is particularly strong in the case of a neighboring country, from which an illegal removal presents few physical problems.

resentatives of the United States Government, sitting at the counsel table, vouched for his testimony, even though the Mexican Government had specifically informed them that petitioner's abduction had occurred without its knowledge or approval.

We find it difficult to understand how any tribunal could conclude on such a record that Huggins' testimony was not perjurious and that the prosecution was not fully aware of the perjury.

The entire purpose of the witness' appearance was to lay a foundation for the admission into evidence of the card containing the words "Deported from Mexico". This card could not be admitted into evidence in the absence of testimony from the subscribing Government official that the entry was made in the regular course of business. And so the witness took the stand and testified that the notation was made in the course of a regular practice involving "any person who is being deported from Mexico" (R. 1036).

In order to introduce the manifest into evidence, Huggins was required to testify that it was made in the regular course of business in respect to deported persons. Thus, in the first place, Huggins had to convey the impression *de hors* the manifest that petitioner was a deportee. On the basis of his testimony of how he handled petitioner as a deported person, the manifest was admitted. The prosecution was then able to rest on its notation "Deported from Mexico," rather than on Huggins' vulnerable testimony.*

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* This analysis of the prosecution's strategy is confirmed by its response to petitioner's contentions on the original appeal (Government's Brief to the Court of Appeals, p. 67):

> "Notwithstanding all this, appellant argues that the entry was not competent because it was made *post litam motam* and therefore was not trustworthy. This argument seems particularly strange in view of the fact that the entry was based on personal observation and the entrant appeared as a witness and was sub-

Knowing that Huggins had been informed of the truth by Senor Obregon, the prosecution was reluctant to use him as the vehicle for proving deportation. It sought to contrive the fraud through the less vulnerable instrument of the written manifest. But it was forced by the rules of evidence to use Huggins' perjured testimony as the foundation for the introduction of the manifest. Thus the notation on the manifest—false in itself—is no immunizer of perjury, as the lower courts suggest. Huggins' testimony could rise no higher than its fraudulent foundation. *Cf.* A. 219.

5. The moving papers adequately demonstrate that, whether or not Huggins' testimony was perjured, the entry "Deported from Mexico" was false. Were we to ignore Huggins' perjury, the prosecution's knowing use of this false evidence nevertheless constituted a fraud.* Hence, the lower courts' opinions directed solely to Huggins' testimony do not meet petitioner's charge. Under the prin-

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jected to searching cross-examination (1520, 1527-35). * * * Furthermore, according to the Inspector's testimony, Sobell was advised that the Immigration Service required a manifest card to be filled out in the case of every person deported from Mexico, after which he willingly furnished certain background information that went into the card, and signed it (1534, 1522, 1526). Since this testimony stands unchallenged, it is difficult to understand the basis of appellant's claim that the entry itself was untrustworthy."

* The prosecution had only one purpose in offering Government Exhibit 25. When defense counsel declared that they would not object to the admission of that side of the manifest showing petitioner's signature and the words "Brought to immigration office by Mexican police", the prosecution rejected that offer and insisted that the other side with the entry "Deported from Mexico" be likewise admitted (R. 1029).

ciples enunciated in *Mooney*, the knowing use of false evidence invalidates a conviction.*

6. On March 9, 1957, two days after the argument before the Court of Appeals, the Secretariat of *Gobernacion*, the department of the Government of Mexico exclusively responsible for the deportation or expulsion of aliens from Mexico officially certified that in its files relating to petitioner "there is no record to the effect that this department has ordered his expulsion from the country." Appendix III, p. 18a, *infra*.**

The Court of Appeals denied petitioner's motion to amend the record to include this statement by the Mexican

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* The Government's present contention, adopted by the lower court, that the entry had the limited purpose of proving forcible return is refuted by the record. In any event, it is beside the point. As Mr. Justice Black stated in *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, 247, "Truth needs no disguise." If the prosecution had wished to prove merely that petitioner was forcibly abducted and returned, it could have done just that.

** This document was particularly significant in view of the Government's argument in the court below. In its brief (at pp. 53-54) the Government asserted that petitioner did "not even make a prima facie showing in his petitions that responsible officials of the 'Mexican Government' were ignorant and did not approve of his ejection from Mexico." To support this contention, it distorted petitioner's evidence:

> "All Sobell can say is that one man in Mexico did not find a record at Nuevo Laredo of Sobell being 'officially deported by the Secretariat of Gobernacion through [Nuevo Laredo].' (Exh. 12 to S. Petition No. 1). The Secretariat at the home office of Gobernacion even disavows 'responsibility' that the person who reported the lack of records was an official of the Mexican Government. (Exh. 13 to S. Petition No. 1)"

This characterization is grossly misleading. As petitioner's motion exhibit 13 plainly shows, the Director General of Administration of "the home office of Gobernacion," far from disavowing "'responsibility' that the person who reported the lack of records was an official of the Mexican Government," certified that the signer of Exhibit 12 was the Chief of the Office of Migration at Nuevo Laredo.

Government, despite the universally applied rule that amendments will always be permitted in the interest of justice in habeas corpus or Section 2255 proceedings.* Inasmuch as the court thereafter held that petitioner was in fact deported (Appendix II, p. 7a), its denial of the amending motion was particularly erroneous.

The lower court's decision stands or falls upon its determination that petitioner was in fact deported. But unless petitioner's allegations, supported by the official statements of the Government of Mexico, are to be ruthlessly disregarded, this is impossible to determine without a hearing. And unless all of the principles underlying the administration of Section 2255 are to be abandoned in the case of this petitioner, the lower court's resolution of this issue without a hearing makes mandatory the reversal of its judgment.

7. While the court below avoided the necessity of granting a hearing by the simple expedient of denying petitioner's factual contentions, the district court sought to avoid the impact of the obvious fraud by rewriting *nunc pro tunc* the record of the original trial.

Thus the district court implies that the prosecution never really intended to adduce evidence concerning "legal deportation." All the prosecution was interested in showing was that "Sobell's return to this country had been involuntary" (A. 218). In summarizing the evidence offered and the summation of the prosecution, Judge Kaufman writes, "Patently, this does not show an attempt by the prosecution to create the impression of legal deportation as is now charged" (A. 218). As to the embarrassing insistence by Huggins and the prosecution on the words

* While the lower court should have accepted petitioner's amendment of the record, at a minimum it should have remanded the case to the district court to reconsider the motion in the light of the new document. See *United States* v. *Pisciotta*, 199 F. 2d 603 (C. A. 2).

"deportation" and "deported", Judge Kaufman concludes: "It is entirely clear that he was using the word 'deported' to mean expelled or ejected * * *" (A. 218).* Since Huggins did not mean "deported" when he wrote "deported", it was not perjury for him to give this testimony in the light of his clear knowledge that the Mexican Government had not deported petitioner.

It is quite apparent why the Court of Appeals found it difficult to adopt this rationale. The original Court of Appeals, consisting of the then Chief Judge Swan, Circuit Judge Chase and the late Circuit Judge Frank, unlike Judge Kaufman, did not read Huggins' testimony and the manifest as establishing that the petitioner had been "expelled or ejected" rather than "deported".

Quite to the contrary, these experienced judges concluded that the evidence offered was intended to establish "*legal deportation*". In ruling on the materiality and relevance of the evidence, they stated: "* * * the Government introduced evidence to show that Sobell had been *legally deported* * * *." (*United States* v. *Rosenberg, supra*, 195 F. 2d at 603; see also footnote 20 at page 603. Our emphasis.) In light of this finding by the original panel, the lower court could hardly adhere to Judge Kaufman's rationale.

Judge Kaufman's opinion, therefore, rests upon the proposition that the prosecution did not intend to create the impression that petitioner had in fact been deported by the Government of Mexico. But if three circuit judges inferred from the evidence that the prosecution was seeking to prove "*legal deportation*", it is manifestly untenable to argue, as Judge Kaufman must, that no members of the jury could conceivably have drawn this

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* In any event, the terms "expelled" or "ejected" would be equally false in that they plainly denote action by the Government of Mexico. See Paragraph 8, *infra*.

same inference. The twelve members of the jury undoubtedly drew the ordinary, everyday inference from the use of the words "deportation" and "deportee". To laymen and jurist alike, these words bore the inevitable connotation of official action by the Government of Mexico.*

8. Even assuming, *arguendo*, that the prosecution did not mean to imply "legal deportation," it is impossible to avoid the conclusion that it sought to paint a picture of action against petitioner by the Government of Mexico. The trial court so characterized the evidence in stating to the jury that "he [petitioner] was apprehended only after being delivered to the United States by the Mexican authorities" (R. 1559-1560).

But petitioner was *not* delivered to the United States by "the Mexican authorities". So to interpret what actually took place is again to ignore petitioner's allegations.** Participation by individual employees of a local police force in a matter unrelated to their duties and

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* This Court in *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730, stressed the connotation of governmental action of the term "deportation":

> "The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend."

** The district court also misstates petitioner's allegations when it suggests that they are based on irregularities in Mexican deportation procedures (A. 201, 217-218). The point of petitioner's charge of course is that Mexico had nothing to do with his removal.

unauthorized by the agency does not convert petitioner's seizure into an act of Mexican authority.*

If, as we allege, the individual Mexican policemen who participated in the abduction were not acting at the direction of any Mexican authority, their conduct could not, of course, be attributed to the Mexican Government. Indeed, their participation—considered together with the other circumstances we have described—confirms the view that they acted on behalf of the FBI. The Government nowhere asserts that these individuals acted on behalf of the agency of which they were members. Such a contention would, of course, frame a question of fact for resolution at a hearing.

We suggest that it was hardly proper for the same judge who charged the jury that they might consider petitioner's apprehension "only after being delivered to the United States by the Mexican authorities" in determining his guilt, to dismiss out of hand and without a hearing petitioner's allegation that this very "element of proof" was false.

9. The district court attempted to deprecate the significance of the fraud charged and maintained that if the facts alleged concerning petitioner's kidnapping had been brought out on the trial it would not have benefited him (A. 164, 220). But Judge Kaufman glossed over the legal

* The individuals who effected petitioner's removal had no "legal or rightful power", no "right to command or to act", no "power * * * in virtue of [their] office", no "jurisdiction", no "authorization", no "quasi-governmental power * * *." (*Webster's New International Dictionary of the English Language*, definitions of "authority".)

The position of the lower court on this question is contradictory. On the one hand, it contends that the activities of the FBI and of the United States Embassy in Mexico on behalf of the prosecution did not constitute acts of the United States. On the other hand, it elevates the escapade of local policemen sponsored by United States authorities to an act of Mexico.

impact of the fraud upon the prosecution's case. Without the "flight" evidence petitioner's conviction on the uncorroborated testimony of a confessed perjurer would have been highly unlikely. The "flight" evidence was therefore vital to the prosecution's case. In turn the "deportation" was, as the district court concedes, the "capstone" of this evidence (A. 218) and, as the prosecution stated, "persuasive evidence of his [petitioner's] consciousness of guilt" (Government brief on original appeal, p. 66). This evidence was utilized by the prosecution to establish that petitioner would not have returned voluntarily to the United States and thereby projected an image of guilty conspiratorial flight.

However, the prosecution could not have used this evidence to accomplish these objectives unless petitioner's removal was in some form attributed to the Government of Mexico. Had it been known that petitioner was seized by agents of the United States, this evidence of "forced return" would have been barred under *McNabb* v. *United States*, 318 U. S. 332, as contrived by the prosecution in violation of federal law.* See Rule 5 of the Federal Rules of Criminal Procedure and Title 18, U. S. C., Sections 1201, 3041, 3042, 3184. The most serious problems of personal and national jurisdiction would have been introduced into the trial.**

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* That conduct such as this would have been subject to the injunction of *McNabb* is evident from the decisions of this Court. Cf. *Rea* v. *United States*, 350 U. S. 214; *Anderson* v. *United States*, 318 U. S. 350; *Nardone* v. *United States*, 302 U. S. 379; *Mesarosh* v. *United States*, 352 U. S. 1; *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115; *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217; *Ballard* v. *United States*, 329 U. S. 187; *Klapprott* v. *United States*, 335 U. S. 601; *Offutt* v. *United States*, 348 U. S. 11; see also *Helwig* v. *United States*, 162 F. 2d 837 (C. A. 6); *United States* v. *Chapman*, 158 F. 2d 417 (C. A. 10); *Kelly* v. *United States*, 194 F. 2d 150 (App. D. C.); *Fletcher* v. *United States*, 158 F. 2d 321 (App. D. C.); *Delaney* v. *United States*, 199 F. 2d 107 (C. A. 1); compare *United States* v. *Coplon*, 185 F. 2d 629 (C. A. 2).

** See companion petition for writ of certiorari.

Moreover, disclosure of the prosecution's role would have precluded the use of evidence concerning petitioner's travels in Mexico as the fruit of illegal search and seizure.* To protect the "flight" evidence from the sanction of *McNabb*, the prosecution suppressed the facts of its abduction and substituted the fiction of Mexican deportation.

This Court has consistently rejected the proposition that it is necessary or indeed possible to evaluate the degree of prejudice resulting from the knowing use of perjured evidence.** But here the prejudice is manifest. By definition, the term "deportation" carries a pejorative connotation, which in this case imported to the jury that petitioner had been returned to the United States by the Government of Mexico as an undesirable alien considered inimical to the welfare of that country.† It imported a prior determination of petitioner's probable guilt. As Judge Kaufman acknowledged (A. 121):

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* The evidence of a trip to Vera Cruz and Tampico and of the use of aliases was obtained directly or from clues secured by the prosecution's agents in the course of their illegal search and seizure of petitioner's residence and person at the time of the unlawful arrest. (Prior to petitioner's arrest the prosecution was completely unaware of his trip to Vera Cruz and Tampico or the use of aliases.) Had petitioner been advised of the circumstances of his seizure, he could have moved for a hearing and upon such hearing had such evidence excluded. *Catalanotte* v. *United States*, 208 F. 2d 264 (C. A. 6); *Boyd* v. *United States*, 116 U. S. 616; *Weeks* v. *United States*, 232 U. S. 383; *Nardone* v. *United States*, 302 U. S. 379; *United States* v. *Caplon, supra*; cf. *Gouled* v. *United States*, 255 U. S. 298; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385.

** *Stein* v. *People of the State of New York*, 346 U. S. 156, 205; *Mooney* v. *Holohan*, *Hysler* v. *Florida*, *Pyle* v. *Kansas*, all *supra*. See also *Coggins* v. *O'Brien*, 188 F. 2d 130, 139 (C. A. 1).

† "'Deportation' is the removal of an alien out of the country simply because his presence is deemed inconsistent with the public welfare * * *." *Fong Yue Ting* v. *United States*, 149 U. S. 698, at 709.

> "• • • indeed it would hurt you if they established that there was a legal deportation because then it would rise to the heights of having a legal adjudication."

In the light of these considerations, it can not be said that the lower courts' opinions reflect sufficient sensitivity to the demands of due process or recognition of the legal consequences of the prosecution's misconduct.

10. To safeguard the fraudulent evidence from judicial attack or inquiry the prosecution made false representations to both the trial and appellate courts that petitioner was deported.

(a) On the day of sentence, petitioner submitted an affidavit in support of a motion in arrest of judgment asserting that the district court lacked jurisdiction over his person. He requested a judicial inquiry to learn the circumstances and parties responsible for his removal from Mexico. In opposing this motion the prosecution attacked the credibility of the affidavit and insisted that petitioner was "a deportee" and that "the final act of deportation was effected at Laredo" (R. 1598-1599.)* As we have shown, the prosecution knew that these representations were false.

"In modern law, the removal, from a country, of an alien considered inimical to the public welfare or not lawfully there;—distinguished from *transportation* and *extradition*." *Webster's New International Dictionary of the English Language.*

"2. *Law.* The sending back of an undesirable or criminal alien to his own country or to the country whence he came." *Funk & Wagnalls New Standard Dictionary of the English Language* (1956).

* Seizing upon petitioner's obviously innocent error of calling his tourist card (then in the hands of the prosecution, A. 33), a "visa", Mr. Saypol sought to convey the impression that petitioner had entered Mexico illegally (R. 1598).

(b) To sustain the conviction, the prosecution represented to the Court of Appeals on the original appeal that petitioner had been deported by the Mexican authorities. It asserted that "there is not a shred of evidence that any United States agent assisted the Mexicans in this act" (Government Brief on original appeal, p. 38).* On the basis of the evidence and these representations, the Court of Appeals concluded that petitioner had been "legally deported." 195 F. 2d at 603.

We need not speculate whether knowledge of the true circumstances of petitioner's removal would have persuaded Judge Chase and Judge Swan to join in Judge Frank's dissent. This Court has held that it will not weigh the relative impact of a fraud practiced upon an appellate court in reversing the judgment. *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238.** The principles

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* In Appendix V we reprint excerpts from the prosecution's brief to the Court of Appeals wherein it insisted that petitioner had been deported by the Mexican authorities.

** Mr. Justice Black, rejecting the contention that the complaining party had failed to show sufficient diligence in exposing the fraud, expressed the rationale underlying the Court's decision (at 246):

"But even if Hazel did not exercise the highest degree of diligence, Hartford's fraud cannot be condoned for that reason alone. This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. * * * Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."

developed in *Hazel-Atlas*, a patent case, are even more compelling here where the administration of criminal justice is involved and the liberty of a citizen is at stake.

This Court has enunciated the standards which must govern the conduct of a prosecutor in a criminal proceeding. *Berger* v. *United States*, 295 U. S. 78, 88.* Before the lower courts, the prosecution clearly did not fulfill its obligations. Even before this Court, the Government lacked candor in failing to point out that the Court of Appeals had mistakenly concluded that petitioner was legally deported.**

These serious charges, uncontroverted by the Government, can only be resolved by granting petitioner a hearing.

11. Throughout this proceeding, the Government has sought to create the impression that petitioner's present charges are merely a "twice told tale", which was litigated in a prior proceeding. This, in turn, is based upon the contention that the present application is no more than a relabeling and recasting of the motion in arrest of judgment submitted by petitioner at the original trial. While neither of the two lower courts rests upon this proposition as a principal ground for denying relief, it is necessary to note that this contention can find no support in the record.

As we have pointed out, the motion in arrest of judgment was supported by an affidavit which raised the question of the court's jurisdiction over petitioner's person on the ground that his arrest appeared to be improper (R. 31-33; Appendix IV, *infra*). Not knowing who the authors of his seizure were and the full circumstances of his removal, petitioner requested the aid of the court to acquire this information by a judicial hearing.

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* Indeed, the prosecutor in this case referred to these standards to clothe the challenged evidence with the prestige and integrity of his office (R. 1510-1511).

** Compare motion of Solicitor General in *Mesarosh* v. *United States*, 352 U. S. 1.

The qualitative difference between the motion in arrest of judgment and the present proceeding is demonstrated not merely by the different legal grounds upon which relief is sought. More significantly, the present motion is based upon a different set of facts. A comparative reading of the affidavit and the present moving papers will establish that the present facts and legal issues have never been litigated before.*

The lower courts could only equate the present proceeding and the prior motion in arrest of judgment by disregarding all the new operative facts posed here for the first time. It is this new evidence which establishes that the prosecution had fraudulently contrived petitioner's conviction. By assimilating the present motion to the prior proceeding the lower courts avoided the burden of considering the merits of petitioner's present motion.

The issue is not whether petitioner has unsuccessfully sought on prior occasions to have his conviction set aside; the issue is whether the new operative facts here posed have been raised and litigated before.** The principles laid

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* It is ironical that the Government relies on the trial motion as a possible bar to this proceeding when the district court and the Court of Appeals held that this motion was untimely and neither ruled on the merits nor litigated the limited facts then presented. 195 F. 2d at 603. Moreover, if petitioner proves his present charges at a hearing, the prior decision on the motion in arrest of judgment must be set aside in that it lacked all validity because of the false representations of the prosecution.

** As this Court stated in *Chessman* v. *Teets*, *supra*, 77 S. Ct. at 1132:

> "Certainly this Court's previous denials of certiorari, Chessman v. People of State of California, 340 U. S. 840; 341 U. S. 929; 343 U. S. 915; 346 U. S. 916; 348 U. S. 864, do not foreclose us from now granting appropriate relief. Brown v. Allen, 344 U. S. 443. And it may be noted that it was not until the present proceedings in the district court that the facts surrounding the settlement of the state court record were fully developed."

down by this Court in habeas corpus proceedings effectively dispose of any contention, however lightly raised, that the present petition is not timely.*

Even prior unsuccessful litigation charging the knowing use of perjured testimony of the same witness does not bar a subsequent motion, unless it is conclusively established that the movant was presenting no new evidence. As Mr. Justice Murphy stated in *Price* v. *Johnston*, 334 U. S. at 290-291:

> "In the first place, however, we cannot assume that petitioner has acquired no new or additional information since the time of the trial or the first habeas corpus proceeding that might indicate fraudulent conduct on the part of the prosecuting attorneys. As Judge Denman stated in his dissenting opinion below, 161 F. 2d at pages 708, 709: 'The gravamen of the misconduct charged is not the fact that the witness changed his testimony but that the prosecuting attorney knowingly caused the witness to give the false testimony. All the accused and his attorney knew at the trial was that the single prosecuting witness changed his testimony. Obviously this in itself does not warrant a charge of fraud. That it was fraudulently done by persuasion of the prosecuting attorney could only have been learned after conviction and after the convicted man was in the penitentiary.'"

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* *Price* v. *Johnston*, 334 U. S. 266 at 289:

> "But here the three prior applications did not raise the issue now under consideration and the three prior refusals to discharge petitioner can have no bearing or weight on the disposition to be made of the new matter raised in the fourth petition."

See, also, *Waley* v. *Johnston*, 316 U. S. 101, 105:

> "The principle of res judicata does not apply to a decision on habeas corpus refusing to discharge a prisoner, Salinger v. Loisel, 265 U. S. 224 * * *. It does not appear that on petitioner's earlier application for a writ of coram nobis the same issue was raised as that now presented. The earlier application was denied for insufficiency upon its face and without a hearing. There is thus no basis for the holding of the district court that the denial is res judicata of the present petition."

The present record clearly demonstrates that petitioner has acquired and is now presenting for the first time new and significant evidence. Moreover, a motion raising a question of personal jurisdiction cannot be equated with one premised upon a denial of due process because of the prosecution's knowing use of false and perjured evidence.

In essence, the Government's position, as adopted by the lower courts, is an attempt to apply the doctrine of laches. But, as this Court indicated in *Chessman* v. *Teets*, *supra*, 77 S. Ct. at 1132, such a concept would destroy the very purpose of the writ. See also *Price* v. *Johnston*, 334 U. S. 266, 291; *Brown* v. *Mississippi*, 297 U. S. 278; *Commonwealth of Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116; *Chessman* v. *Teets*, 350 U. S. 3.*

The lower courts also imply that petitioner at the time of trial knew, or should have known, all the facts upon which his present allegations rest. Therefore, they argue, he has shown a lack of diligence in pursuing the issue; that

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* The reason for refusing to apply the doctrine of laches to a petition in the nature of a writ of habeas corpus has been well stated by Judge Fahy in *Farnsworth* v. *United States*, 232 F. 2d 59 (App. D. C.):

> "If a defendant without good reason waits a long time before asserting his claimed right, with the consequence that many witnesses are dead, he might have difficulty maintaining his burden of proof, or a heavier burden of proof might be imposed upon him. See United States v. Morgan, 222 F. 2d at page 675. But where the fundamental constitutional right has been denied, an accused should not be precluded from relief because he cannot satisfy a court that he had good cause for any delay in seeking it. 'To permit a defense of laches to the writ would, in effect, denude it of one of its essential characteristics—the power to hurdle a time factor.' Haywood v. United States, D. C., S. D., N. Y., 127 F. Supp. 485, 488."

See, also, *United States* v. *Morgan*, 222 F. 2d 673 (C. A. 2).

he consciously withheld this "trump card."* (Appendix II, p. 9a.) But, as petitioner stated in his moving papers, he did not know that he had been kidnapped by the prosecution's agents without the knowledge or consent of Mexico, that the prosecution had been informed of Mexico's protest and that it knowingly used false evidence and perjured testimony (A. 74). This evidence was obtained several years after his conviction.**

In any event, the issue of petitioner's prior knowledge is a question of fact which could only be determined through a judicial hearing. Moreover, a conviction contrived by the prosecution's knowing use of perjured evidence cannot be immunized from collateral attack because the defendant may have known or believed the evidence to be false. To state such a proposition is to answer it.†

To hold that petitioner's motion in arrest of judgment bars relief in this proceeding would require not only a rewriting of the record, but a disregard of the beneficent purpose of the writ.

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* The Government's claim that petitioner lacked diligence is particularly unseemly in view of the fact that the prosecution used every device to suppress evidence of the fraud and proof of its misconduct. No one but the prosecution knew the nature of the fraud. Cf. *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, *supra*, at 246. Petitioner's uncertainly framed oral motion in arrest of judgment, supported by an admittedly limited affidavit and upon grounds which raised obvious questions of timeliness, was hardly a trump card. See Appendix IV, *infra*.

** This is substantiated by the dates on the exhibits establishing that petitioner has not been deported or expelled by the Government of Mexico (Exhibit 12 and Appendix III, p. 18a, *infra*). Notarized statements in petitioner's possession, upon which many allegations in the motion are based, were only obtained in 1956.

† The prosecution in *Mooney* v. *Holohan*, *supra*, contended that the defendant must have known that he was not at the place charged and hence that the testimony was false. But this Court did not consider that a ground for denying Mooney a hearing.

Conclusion

The issue raised in this proceeding is whether or not petitioner will be granted an opportunity to prove in the course of a hearing his detailed factual allegations which, if true, establish that his conviction was fraudulently contrived by the prosecution. The trial court's defensive and intemperate rejection of petitioner's contentions does not put these charges to rest. Nor does the lower court's cursory treatment of the issues raised inspire the conviction that justice has been done. If this were an ordinary case, we venture to say that a hearing would have been granted long ago. It can hardly be doubted that this petitioner is forced to seek relief here because of the gravity of the charges raised by his motion and the nature of the crime for which he was convicted.

There may be those who would shrink from granting petitioner the modest relief he now seeks because it might cast a shadow upon the validity of the unalterable sentence of his co-defendants. But only by exposing these charges to the test of a judicial hearing can we resolve the substantial doubts which haunt this case. No one unaffected by a partisan interest in protecting the extreme measures of the past era against the criticism of history will understand a reluctance to give this petitioner his day in court.

Our nation cannot tolerate a conviction steeped in fraud and tainted by false and perjured evidence. In the words of Mr. Chief Justice Warren, "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. * * * The Government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with it."

To admit the possibility of injustice in the administration of our criminal law, particularly when the fate of individuals becomes entwined with larger political issues, is concededly difficult. But the corrective processes of our law, the writ of habeas corpus itself, confirm the ability

of our democratic system to redress, in the calmer atmosphere of today, the injustices engendered by the passions of an earlier period. The validity of this proud claim, the ability of our law to engage in "sturdy self-examination and self-criticism," to function as a "civilized legal mechanism," must be confirmed in this case.

An order from this Court granting the hearing required under the law and the Constitution will demonstrate to all that our country is confident enough in the strength and vitality of its institutions to do justice to all men.

The petition for writ of certiorari should be granted. The orders and judgments below should be vacated forthwith with instructions to grant a hearing on the allegations of the petition.

Respectfully submitted,

FRANK J. DONNER,
ARTHUR KINOY,
MARSHALL PERLIN,
342 Madison Avenue,
New York, New York,

BENJAMIN DREYFUS,
703 Market Street,
San Francisco, California,

Attorneys for Petitioner.

Of Counsel:

FRANK J. DONNER,
ARTHUR KINOY,
MARSHALL PERLIN,
BENJAMIN DREYFUS,
LUIS SANCHEZ PONTON,
University of Mexico,
Mexico City, Mexico.

APPENDIX I

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of May, one thousand nine hundred and fifty-seven.

Present:

HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
Circuit Judges,
HON. CLARENCE G. GALSTON,
District Judge.

[SAME TITLE]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

APPENDIX II

Opinion

UNITED STATES COURT OF APPEALS

For the Second Circuit

Nos. 235 and 236—October Term, 1956

(Argued March 5, 1957 Decided May 14, 1957)

Docket Nos. 24299 and 24300

[Same Title]

Before:

Medina and Waterman, *Circuit Judges*, and Galston, *District Judge*.

Appeal from an order of the United States District Court for the Southern District of New York, Irving R. Kaufman, *Judge*.

Defendant appeals from an order denying two motions, made pursuant to the provisions of 28 U. S. C. Section 2255, for hearings and for orders setting aside his conviction for espionage conspiracy. Opinion below, 142 F. Supp. 515. Affirmed.

Paul W. Williams, United States Attorney for the Southern District of New York, New York City (Robert Kirtland and Maurice N. Nessen, Assistant United States Attorneys, New York City, of Counsel), *for plaintiff-appellee*.

Appendix II

Donner, Kinoy & Perlin, New York City, and Benjamin Dreyfus, San Francisco, California (Frank J. Donner, Arthur Kinoy and Marshall Perlin, New York City, Benjamin Dreyfus, San Francisco, California, and Luis Sanchez Ponton, Mexico City, Mexico, of Counsel), *for defendant-appellant.*

Medina, *Circuit Judge*:

At the close of a trial with his co-defendants Julius and Ethel Rosenberg, appellant was sentenced to thirty years imprisonment on April 5, 1951. After numerous attempts to vacate the judgment of conviction on various grounds, including several prior applications under 28 U. S. C. Section 2255, all of which were denied and the rulings affirmed on appeal and certiorari denied by the Supreme Court, appellant made the two motions which resulted in the order appealed from. The first motion is based upon the charge that, at the trial in 1951, the prosecution "knowingly, willfully and intentionally used false and perjurious testimony and evidence, made false representations to the Court, and suppressed evidence which would have impeached and refuted testimony given against petitioner." The second motion is based upon the charge that the "United States itself, as well as its courts * * * lacked all sovereignty and power to conduct the proceedings," and that the trial court lacked jurisdiction because of alleged violations of the Constitution and laws of the United States, including "the Extradition Treaty between the United States and Mexico." The subject matter of these charges relates to the seizure of appellant in Mexico City by the Mexican Security Police, his transportation to Laredo, Texas, where the United States Immigration Inspector made a record of appellant's entry on August 18, 1950 into the United States, and his

arrest, pursuant to a warrant duly issued on August 3, 1950 in the Southern District of New York. While appellant asserts that his contentions have not been made before, the records of the District Court make it abundantly plain that, except for some elaboration in matters of detail and the articulation of what are alleged to be new legal theories, the charges are not new, but have already been rejected in one form or another. These prior proceedings and the procedural obstacles to any possible favorable action on the two new motions have been so fully set forth in the detailed discussion appearing in the well reasoned and comprehensive opinion of Judge Irving R. Kaufman that we think it not necessary to do more than note our approval of what he has written.

The charges are of such a serious and sensational character, however, and upon careful examination they turn out on the face of the record to be so utterly groundless, that we shall briefly set forth our reasons for holding that the trial judge could not have arrived at any conclusion other than to decide, as he did, that there be no hearing on either application, as "the files and records of the case conclusively show that the prisoner is entitled to no relief," 28 U. S. C. Section 2255. There was no foisting of perjurious testimony upon the court and jury by the prosecution; no false representations were made; there was no suppression of evidence; there was no violation of the Extradition Treaty between the United States and Mexico, or of any of the provisions of the Constitution and laws of the United States; and the motions were properly denied *in toto*.

I

At the trial there was evidence which definitely connected appellant with the aims and purposes and with the consummation of the ends of the espionage conspiracy.

Appendix II

United States v. *Rosenberg*, 2 Cir., 195 F. 2d 583, cert. denied, 344 U. S. 838, rehearing denied, 344 U. S. 889. This was supplemented by proof from which the jury might well have inferred that the Rosenbergs and appellant suspected that the FBI was closing in on them and that an elaborate plan was devised which envisaged escape from the law enforcement authorities of the United States by flight to Mexico and thence by way of Vera Cruz or some other seaport to Europe, with Soviet Russia as the ultimate destination. We had another phase of this same planned exodus to Mexico before us in *United States* v. *Perl*, 2 Cir., 210 F. 2d 457, in which case Perl testified in his own defense and described how he was approached on the subject.

The testimony in this case was to the effect that Rosenberg outlined a pattern of flight for David Greenglass and his wife that would take them to Mexico, then to Europe via Vera Cruz and finally to Russia. Shortly after Greenglass and Harry Gold, another member of the spy ring, were apprehended, appellant began to follow the pattern of flight outlined by Rosenberg to the Greenglasses.

Accordingly, the prosecution proved at the trial that appellant with his wife and children went to Mexico City in the spring of 1950. Had this been a vacation jaunt for a brief sojourn, with the intention of returning to the United States, there was ample opportunity for appellant's experienced and astute trial counsel to adduce evidence to prove it; but no such evidence, testimonial or documentary, was forthcoming, and appellant did not even testify in his own defense. The prosecution, on the other hand, produced a number of witnesses who made it clear that appellant went to Mexico for purposes of flight, with a quite settled determination not to return to the United States if he could avoid doing so. The relevancy and sufficiency of this evidence have already been passed upon. *United States* v. *Rosenberg, supra.*

Appendix II

The witness Manuel Giner de los Rios, who lived in the same apartment house as appellant in Mexico City, testified that he became acquainted with appellant, who told him some time in July that he was an American and was afraid that "they were looking for him so that he would have to go in the Army"; that appellant was looking for information as to how to get out of Mexico; that a few days later appellant asked for directions of how to go to Vera Cruz, which the witness gave him; that appellant was away for about 15 days, somewhere around the 20th or 22nd of July, 1950, during which period of time the witness received from appellant in the mail an envelope postmarked Vera Cruz addressed to the witness, containing a letter which the witness delivered to appellant's wife, and another postmarked Tampico, another Mexican seaport, also containing a letter for appellant's wife.

Other witnesses testified to the use by appellant of false names and an elaborate system of correspondence from appellant in Mexico, enclosing letters for delivery to members of appellant's family in the United States, with return addresses on the envelopes and the names "M. Sowell" and "M. Levitov." The effort to avoid interception and detection is perfectly plain. Indeed, in one of his prior Section 2255 applications appellant stated: "I left the family in the Mexico City apartment and travelled around Mexico to Vera Cruz and Tampico, even using false names and inquiring about passage to Europe and South America for all of us."

The proof of appellant's return to the United States by the Mexican Security Police merely supplemented the proof of appellant's consciousness of guilt by explaining his presence at the trial, which appellant appears to concede was not voluntary. As we said on the first appeal, *United States* v. *Rosenberg, supra*, at p. 602, "otherwise the jury might have inferred that he had voluntarily returned to stand trial."

Appendix II

So we turn to the specifications of alleged perjury, false representations and suppression of evidence.

Immigration Inspector Huggins testified that on August 18, 1950 about nine Mexican officials brought appellant to him in Laredo, Texas, that he filled out the manifest, which is now challenged as palpably false, noting from what he had observed and not from anything said to him by the Mexican officials, "Deported From Mexico," and further data, such as appellant's occupation of electrical engineer, that he had spent all his life in the United States "until about two months ago," his age, address, and so on, from answers given to him by appellant. On the reverse side of the manifest, under "Remarks and Endorsements" is written, "Brought to Imm. Office by Mex. Police," followed by the signatures of Inspector Huggins and appellant.

By some process of reasoning that is far from clear to us, this is supposed to be wilful perjury because appellant asserts that he was assaulted and "kidnapped" by the Mexican Security Police, as agents of or instigated by the FBI, and brought to Laredo, Texas, without any formal deportation proceedings, which we are told are elaborate and technical and always observed with meticulous care by the Mexican authorities.

But appellant was nonetheless deported and the witness did no more than testify to what he personally observed, or was told by appellant, and noted in the manifest in the regular course of his official duties. It is nothing short of absurd to characterize this as wilful perjury deliberately foisted on the trial court by the prosecution. There was no perjury.

The charge that the judgment of conviction cannot stand because the prosecutor procured it by false representations also falls of its own weight. On appellant's motion in arrest of judgment, made shortly after the conclusion of the trial, and on April 5, 1951, his counsel referred

(p. 17a)

DEPTO. DE MIGRACION.
SECC. DE PROHIBICIONES.
MESA 9.
4/350.8."50"/2543.

SECRETARIA DE GOBERNACION

ASUNTO: Se informa.

SR.
LIC. JUAN MANUEL GOMEZ GUTIERREZ.
Donceles No.87-14.
C I U D A D.

10907

En respuesta a su escrito de 19 de abril anterior, manifiesto a usted que en el expediente que se llevó al señor MORTON SOBELL, de nacionalidad norteamericana, no hay constancia alguna de que este Departamento haya ordenado su expulsión del país.

Atentamente.

SUFRAGIO EFECTIVO. NO REELECCION.
México D.F., 9 de marzo de 1957.
POR AC. DEL C. JEFE DEL DEPTO.
EL INSPECTOR.

JOSE [illegible] PEREZ.

to the manifest prepared by Inspector Huggins as a "downright falsehood," and read into the record an affidavit of appellant describing the "kidnapping" in some detail, in the course of which appellant stated that he tried to show the Mexican police his "papers, visas etc.," concluding with the charge that the United States had secured jurisdiction over appellant "by a criminal, illegal, act, and so the United States must send Sobell back to the place where they took him from, to deal with him accordingly some time in the future." This motion was denied and the order affirmed and certiorari denied, and this forms part of the background described in the opinion of Judge Irving R. Kaufman, 142 F. Supp. 515.

The alleged false statements were made by the prosecutor who spoke briefly, after counsel for appellant had fully stated the grounds for his motion in arrest of judgment. The first of these is:

> This very affidavit (of Sobell) contains a falsehood in the statement that there was exhibited amongst other things to the Mexican authorities visas. Counsel ought to know that his client never went into Mexico with a visa.

This is supposed to be false because, although appellant concededly had no visa, he did have a tourist card, which counsel now insists is a "tourist card (visa)." Thus the charge collapses. The statement as made was in all respects true. The balance of the claim of wilful deception of the court has in effect already been disposed of. The prosecutor said:

> The whole affidavit (of Sobell) portrays certainly that this defendant was not honorably escorted from Mexico but that literally he was kicked out as a deportee.

Appendix II

As the trial judge had the affidavit before him, it is difficult to see how any characterization of its contents could possibly justify a charge of wilful misrepresentation and deception; but in fact the statement was accurate. Appellant was deported from Mexico; he did not return to the United States voluntarily; and the expression "kicked out," while perhaps offensive to a refined ear, describes precisely what happened to him on August 18, 1950.

The alleged suppression of evidence is more of the same thing, with some elaboration. Appellant's international vaccination certificate is mentioned but appellant knew of its existence, made no reference to it at the trial, and he must have realized that it would cut both ways if offered in evidence. He might well have claimed that its possession demonstrated an intention to return to the United States, but the prosecution would just as likely have argued to the contrary. None of the remaining so-called "facts of abduction" tended in the slightest degree to demonstrate that appellant would have returned to the United States of his own volition. Nor are we able to discern any suppression of any evidence by the prosecution.

The nub of the matter is that what appellant now asserts he asserted in substance and in the most unequivocal way in his motion in arrest of judgment. It was then clear that what he then knew was available for his defense at the trial but, as stated by Judge Frank in his opinion on the first appeal (195 F. 2d at p. 603): "He preferred to take his chances on the verdict, withholding his trump card until the trial was over. The Federal Rules of Criminal Procedure allow no such tactic." We may add that the "trump card" would probably have proved more harmful than beneficial to appellant's defense. At least it is fair to assume that such was the conclusion arrived at by his trial counsel. They decided not to pursue the subject at the trial, further than upon the cross-examination of Inspector Huggins.

who testified that he was expecting appellant at Laredo, Texas, and "we had a lookout on him to prevent his departure from the United States." When this testimony was thus elicited, counsel for appellant stated, "that is just exactly what I wanted to get at," but the subject was not pursued further after Inspector Huggins left the witness stand.

The cases relied upon by appellant, such as *Hysler* v. *Florida*, 315 U. S. 411, *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, and *Mesarosh* v. *United States*, 352 U. S. 1, and others, where the court found perjured testimony had been used or there was improper conduct on the part of prosecuting officers, involve facts which bear not even a remote resemblance to the factual background of this case; the principles stated in those cases have no application here.

II

Appellant's supplementary motion also rests upon the charge that he was forcibly abducted from Mexico by the Mexican Security Police as agents of the United States. He contends that the alleged abduction was a violation of the Extradition Treaty between the United States and Mexico, 31 Stat. 1818, and that as a result the United States lacked power to proceed against him. He relies upon *Cook* v. *United States*, 288 U. S. 102, which holds that the United States courts may not acquire jurisdiction by means of a treaty violation. As appellant says, his "objection to national and, consequently, judicial power does not rest on the kidnapping or abduction of appellant as such, but rather upon the violation of the treaty." We must inquire, therefore, whether there has been a violation of the treaty with Mexico.

It seems too plain for reasonable debate that *Ker* v. *Illinois*, 119 U. S. 436, answers that question in the negative, even if appellant's factual assertions be taken as true.

That case involved a treaty with Peru, 18 Stat. 719, in all pertinent respects the same as the one before us, i.e., each treaty provides for extradition for certain named crimes and neither the treaty with Peru nor the treaty with Mexico in terms prohibits abduction by one party of criminals found in the territory of the other. Ker, who had been charged with a crime committed in the United States, had left the country and was located in Peru. The President of the United States issued a warrant and sent a messenger to Peru to receive Ker from the Peruvian authorities in compliance with the treaty. Instead, the messenger kidnapped Ker and returned him forcibly to the United States. Ker excepted to the jurisdiction of the court but was convicted. Upon Supreme Court review of affirmance of his conviction by the Illinois court, Ker urged two other grounds for reversal,

> But the main proposition insisted on by counsel for plaintiff in error in this court is, that by virtue of the treaty of extradition with Peru the defendant acquired by his residence in that country a right of asylum, a right to be free from molestation for the crime committed in Illinois, a positive right in him that he should only be forcibly removed from Peru to the State of Illinois in accordance with the provisions of the treaty, and that this right is one which he can assert in the courts of the United States in all cases, whether the removal took place under proceedings sanctioned by the treaty, or under proceedings which were in total disregard of that treaty, amounting to an unlawful and unauthorized kidnapping. [119 U. S. at p. 441.]

Although the language appellant uses is slightly different, there can be no doubt that he is asserting precisely the same claim as did Ker, which claim was rejected by the Supreme Court.

And the *Ker* case continues to have validity. It was cited in the *Cook* case, relied upon by appellant, and in *Frisbie* v. *Collins*, 342 U. S. 519, where the Court said at p. 522:

> This Court has never departed from the rule announced in *Ker* v. *Illinois*, 119 U. S. 436, 444, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction."

Appellant seeks to avoid the impact of the *Ker* case by insisting that, although there was no treaty violation in that case, there was such a violation in the case at bar. "Unlike the facts in *Ker*", appellant says, "the petition here charges action by the United States Government * * *." Appellant relies on "The actions of the United States' agents in initiating, planning and participating in the seizure." But it can hardly be maintained, still assuming the truth of appellant's charges, that the unlawful and unauthorized acts of the Mexican police acting in behalf of subordinate agents of the executive branch of the United States Government were any more acts of the United States than the unlawful and unauthorized acts of the emissary of the Chief Executive. We think the question presented is indistinguishable from that before the Supreme Court in *Ker*, and that our decision here is controlled by that case.

Affirmed.

APPENDIX III

Motion to Amend Record

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

Comes now the appellant, upon the affidavit of Marshall Perlin, duly verified, the tenth day of April, 1957, and respectfully moves the Court that the appeal record be expanded to include as a part thereof the Exhibit attached hereto, and for such other and further relief as to the Court seems necessary and proper in the premises.

Dated: New York, N. Y., April 10, 1957.

Yours, etc.,

DONNER, KINOY & PERLIN,
342 Madison Avenue,
New York, N. Y.,

by Marshall Perlin,
MARSHALL PERLIN.

BENJAMIN DREYFUS,
57 Post Street,
San Francisco, California.

LUIS SANCHEZ PONTON,
University of Mexico,
Mexico City, Mexico,

Attorneys for Defendant-Appellant.

To:

HON. PAUL W. WILLIAMS, Esq.,
United States Attorney,
United States Courthouse,
New York, New York.

Appendix III

Affidavit of Marshall Perlin, Read in Support of Motion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MARSHALL PERLIN, being duly sworn, deposes and says: He is one of the attorneys for the appellant herein and submits this affidavit in support of the motion to incorporate a letter from the Secretariat of Gobernacion of the Government of Mexico (attached hereto, made a part hereof, and marked Exhibit A), into the record on appeal.

The appeal was argued before this Court on March 5, 1957. The attached Exhibit was forwarded by Dr. Luis Sanchez Ponton some time after his return to Mexico City and was received by deponent last week. This Exhibit, dated March 9, 1957 and mailed by the Secretariat of Gobernacion on March 14, 1957, states in part:

> "that in the files pertaining to Morton Sobell, United States citizen, there is no record to the effect that this department has ordered his expulsion from the country."

Facts and documentary evidence in the moving papers establish that appellant was not legally deported or otherwise expelled by the Government of Mexico or any of its authorities; his abduction could not in any manner be attributed to the Government of Mexico or be considered an act of its authorities. (See A 24-25-26, 69, and exhibits referred therein.)

Appellant's allegations heretofore made are sufficient, and they have not been controverted by the Government in its answering papers. Nevertheless, appellant considers it appropriate, in view of certain statements made by the United States Attorney in his brief to this Court and upon

Appendix III

oral argument, to bring this official statement to the attention of the Court. In the course of oral argument before this Court Mr. Williams stated, in response to a question by Judge Medina, that appellant had been legally deported by Mexico.* The attached document answers this contention.

As set forth in the petition and appendices in support thereof, the Migration Department of the Secretariat of Gobernacion has exclusive authority on all matters relating to the removal of aliens from that country even when the action is instituted by the Chief Executive. Any removal by the authorities of the Government of Mexico must be authorized by and reflected in the files of that Secretariat and Department. (Appendix A to the petition, Article 92; Appendix B to the petition, Articles 1, 3, 28, 32 and 74.) The attached Exhibit demonstrates that appellant was neither deported nor in any fashion expelled by that country.

In light of appellee's arguments, in fairness to appellant and as an aid to this Court it is respectfully requested that the aforesaid exhibit be incorporated into the appeal record.

MARSHALL PERLIN.

(Sworn to April 10, 1957.)

---

* The Government in its answering brief had contended our proof merely indicated that an immigration official of Nuevo Laredo was unaware of appellant's deportation. The Government stated, at page 53 of its brief:

> "Sobell does not even make a prima facie showing in his petitions that responsible officials of the 'Mexican Government' were ignorant and did not approve of his ejection from Mexico. Indeed, the inference from 'facts' which Sobell can truly report—for examples, his trip to Police Headquarters and the ease with which he crossed the Mexican border—is to the contrary. All Sobell can say is that one man in Mexico did not find a record at Nuevo Laredo of Sobell being 'officially deported by the Secretariat of Gobernacion through [Nuevo Laredo].' (Exh. 12 to S. Petition No. 1.) The Secretariat at the home office of Gobernacion even disavows 'responsibility' that the person who reported the lack of records was an official of the Mexican Government. (Exh. 13 to S. Petition No. 1.)"

Appendix III

Exhibit

OFFSET

(See opposite ☞)

SR.
LIC. JUAN MANUEL GOMEZ GUTIERREZ.
Donceles No.87-14.
C I U D A D.

10907

En respuesta a su escrito de 19 de abril anterior, manifiesto a usted que en el expediente que se lleva al señor MORTON SOBELL, de nacionalidad norteamericana, no hay constancia alguna de que este Departamento haya ordenado su expulsión del país.

Atentamente.

SUFRAGIO EFECTIVO. NO REELECCION.
México D.F., 9 de marzo de 1957.
POR AC. DEL C. JEFE DEL DEPTO.
EL INSPECTOR.

JOSE [illegible] TERE[illegible].

DESPACHADO
MAR 14 1957

c.c.p-Control.-Edif.

MRM/dhe-s-n-c-exp.

Appendix III

Translation of Exhibit

DEPARTMENT OF THE INTERIOR

Department of Migration

Promotion Division

Desk 9

4/350.8. "50"/2543.

RE: *Information*

To:

JUAN MANUEL GOMEZ GUTIERREZ, Attorney
Donceles No. 87-14
City.

10907

In reply to your letter of April 19 ult., I wish to advise you that in the files pertaining to MORTON SOBELL, United States Citizen, there is no record to the effect that this Department has ordered his expulsion from the country.

Yours very truly,

TRUE SUFFRAGE. NO REELECTION.
Mexico, D. F., March 9, 1957
By consent of the Head of the Dept.
Inspector
(signature illegible)
JOSE INEZ PEREZ

Mailed March 14, 1957

cc: Control, Building
AHM/dhe-s-n-c-ecp.

Appendix III

Affidavit of Paul W. Williams, Read in Opposition to Motion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

PAUL W. WILLIAMS, being duly sworn, deposes and says:

1. I am the United States Attorney for the Southern District of New York and represent the Government in this case. This affidavit is submitted in opposition to the appellant's motion to "incorporate * * * into the record on appeal" a letter supposedly written by the Mexican Department of Migration. The letter tendered by appellant purports to establish that Sobell was not ordered deported by the Department of Migration. That is irrelevant; the Government has never contended that Sobell was ordered deported by that Department. The Government's evidence at the trial established that Sobell was in fact deported by the Mexican Secret Police.

2. The letter now tendered by appellant might be relevant if the issue on this appeal turned upon whether the Secret Police or the Department of Migration as a matter of internal organization of the Mexican Government, should have accomplished Sobell's deportation. That intra-governmental question, however, is not before this Court.

Appendix III

Here the question is the authority of the United States to try one of its citizens for the crime of espionage, and the fairness of the trial in which a jury of twelve men found beyond a reasonable doubt that Sobell had in fact committed that crime.

3. The grounds of the Government's opposition are: 1) the letter is irrelevant, 2) it is not newly discovered, 3) on this review of a decision of the District Court documents not before that Court may not properly be added to the record here.

4. Irrelevance.—Appellant contends that Sobell was not deported from Mexico. Appellant contends that deportation must be accomplished by the Department of Migration. Appellant further contends that before deportation can be effected the administrative procedures of that department, must be followed with a right in the prospective deportee to judicial review. (Appellant's Briefs #24299 p. 13, and #249300 p. 10.)

5. That the Executive of Mexico has a right to deport aliens immediately and without prior court proceedings is apparent from Article 33 of the Mexican Constitution contained in Appendix A to Appellant's motion of May 8, 1956, which reads as follows:

> "Article 33.—Aliens are those who do not possess the qualifications provided in Article 30. They have the right to the guarantees granted by Chapter I, Title One, of this constitution; but the Executive of the nation shall have the exclusive authority to make any alien whose permanence he may deem inconvenient abandon the national territory, immediately and without prior court proceedings

Appendix III

Aliens may not mix in the political matters of the country in any manner."

6. *Not newly discovered.* If appellant had desired to place before the District Court documents such as the one he now tenders, there is no legitimate reason why he could not have done so. The tendered letter states simply that there is no record that the Department of Migration ordered Sobell's expulsion. That counsel for Sobell had access before making the instant § 2255 motions in the District Court, to other papers purporting to establish the same thing is indicated by a book entitled "The Judgment of Julius and Ethel Rosenberg", written by one John Wexley who acknowledged the assistance of counsel for the appellant, Howard Meyer and Benjamin Dreyfus (Cameron and Kahn, 1955). See Appendix 18 to that book which purports to be a telegram from the Laredo Office of the Mexican Department of Migration to the Chief of the Office of Migration, dated August 19, 1950, and reads as follows:

> NUMBER 1920. MEXICAN CONSULATE, LAREDO, TEXAS, INFORMS ME ON DEPORTATION FROM MEXICO TO UNITED STATES OF AMERICA OF THE NORTH AMERICAN, MORTON SOBELL, WHICH TOOK PLACE 3:45 A.M. YESTERDAY BY SECRET SERVICE AGENTS OF THE CAPITOL WHO EVADED THE VIGILANCE OF THE MIGRATION SERVICE. I PASS ON FOR YOUR FULLEST INFORMATION.

The fact that the appellant has now obtained a letter which contains only some of this information (that the Migration Service did not deport Sobell) and omits the rest (that the Secret Service did) hardly qualifies the evidence as newly discovered.

Appendix III

7. Impropriety of Adding Documents Not Before the District Court. Appellant contends that the District Court erred in its ruling. Appellant's burden on this appeal therefore must be carried on the basis of the record before the District Court. Documents not before that Court can obviously have no bearing upon the propriety of that Court's decision. The Government respectfully submits that the tendered letter may not properly be added to the record on appeal.

PAUL W. WILLIAMS,
United States Attorney.

(Sworn to April 15, 1957.)

Appendix III.

Reply Affidavit of Marshall Perlin, Read in Support of Motion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MARSHALL PERLIN, being duly sworn, deposes and says that he submits this affidavit in reply to the answering affidavit of Paul W. Williams, Esq. and in support of the motion to incorporate a certain document into the record on appeal.

The appellee misconceives the purpose of tendering the aforesaid exhibit. As stated heretofore, it is offered to establish that the statements made by appellee in its brief and in its oral argument that appellant had been legally deported by the Government of Mexico was erroneous.

If the executive agency of the Government of Mexico which is responsible for the supervision and removal of all aliens under any and all circumstances is prepared to certify that its files are devoid of any records of deportation or expulsion, that certification is probative of the fact that appellant was not expelled and that the Mexican authorities had nothing to do with his removal.

In its brief on appeal from the original judgment of conviction, the prosecution had argued to this Court that the evidence presently challenged established that appellant had been legally deported. The exhibit which deponent seeks to incorporate into the record on appeal establishes that this contention was false.

Appendix III

The Government's answering affidavit represents the first occasion in the instant proceeding where the appellee has attributed the removal of appellant to the Chief Executive of Mexico, purportedly pursuant to Article 33 of the Mexican Constitution. The appellee thereby purports to establish that the Secret Police of Mexico City were acting pursuant to the direction of the Chief Executive of that nation. In addition to ignoring the fact that a removal pursuant to Article 33 would be reflected in the files of the Secretariat of Gobernacion and that such action must be countersigned by the head of that department, it suggests an illegal act on the part of the Chief Executive. Of course, there is no evidence to sustain appellee's contention.

This belated claim is in direct conflict with the factually supported allegations contained in appellant's moving papers. It is unsupported by any evidence in the files and records of this case.

The determination of this pertinent issue of fact cannot be resolved by exchanges of affidavits. It must be resolved by granting appellant a hearing. The answering affidavit of appellee establishes the relevancy of the document and makes necessary the reversal of the decision of the court below.

WHEREFORE, deponent respectfully requests that the relief sought in the motion be granted.

MARSHALL PERLIN.

(Sworn to April 18, 1957.)

Appendix III

Order Denying Motion

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of April, one thousand nine hundred and fifty-seven.

Present:

HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
Circuit Judges,

HON. CLARENCE G. GALSTON,
District Judge.

[SAME TITLE]

A motion having been made herein by counsel for the appellant to amend the record on appeal,

Upon consideration thereof, it is

ORDERED that said motion be and it hereby is denied.

A. DANIEL FUSARO,
Clerk.

APPENDIX IV

Affidavit of Sobell in Arrest of Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MORTON SOBELL, being duly sworn, deposes and says:

I am one of the defendants herein and I make this affidavit in the interest of justice and in furtherance of my rights as an American born and brought up in this country.

On Wednesday, August 16, 1950 at about 8:00 P. M. we had just finished our dinner in our apartment in Mexico City in the United States of Mexico, and while my wife and I were lingering over our coffee there was a knock on the door. My older daughter opened the door and three men burst into the room with drawn guns and bodies poised for shooting; these men did not ask my name, did not say what they wanted. I demanded to see a warrant, or some other legal process. No reply, except some vague charge that I was one "Johnny Jones" and that I robbed a bank in Acapuco in the sum of $15,000.00 was made. Of course, I vehemently denied the charge and tried to show them my papers, visas, etc., to prove that I was no bank robber.

One of the men showed a piece of metal in his hand and said they were police. They were dressed in civilian clothes. A fourth man came later. He also was in civilian clothes.

Appendix IV

Only about 10 minutes lapsed from the time that they came till they hustled me out, and that was after I insisted on calling the American Embassy; but without being permitted to do so.

They picked me up bodily and carried me down from the fourth floor to the ground floor. In the street I kept shouting for the police. A taxi was hailed and they opened the door; tried to force me into the taxi; when two more men came in and beat me over the head with black jacks until I lost consciousness. I woke up in the taxi and I was stretched horizontally at the feet of the three men.

When the car stopped in front of a building, they ordered me to get up; they told me to get into the building, but not to make a scene or they would plug me. We walked to the elevator; we went upstairs, and, we went into an office. They sat me down and a slim, tall, dark man came over; he looked at me. I asked him what it was all about: He slapped me in the face and told me that *they* were the ones that were *asking* questions. At that point I discovered that my head was bloody and my shirt bespattered with blood.

However, they asked me no questions, but they photographed me in several poses. We spent in that building from approximately 8:30 P. M. till 4:00 A. M. At 12:00 midnight, they offered me something to eat; but I had no appetite for food. During all the time no one questioned me. Some persons who identified themselves as officers to guard me chatted with me but expressed ignorance of the reason I was there.

At 4:00 A. M. I was moved into a large four door Packard and seated in the rear with two armed men, one on each side of me. At that moment, the same tall thin man came to the door and spoke to my guards in *English* saying to them "if he makes any trouble, shoot him."

Appendix IV

The driver of the car, who apparently was the leader of the expedition, and who answered to the name of "Julio" told me that they were taking me to the Chief of the Mexican police for further action. With a number of stops for one reason or another, we drove on till about 6:00 P. M. At that time Julio tried to make a phone call, or he did make one, and he told me that he was trying to get the Chief of Police. The same thing happened at about 10:00 P. M., and at midnight, on August 17th, telling me that he was trying to make sure that the Chief of Police would be available.

At about 1:30 we arrived at Nueva Lorado, we stopped in front of a building, and Julio went into the building and returned in about ten minutes and told me that he had spoken to the Chief and that the Chief told him to take me across the border and let me go.

We stopped at the Mexican customs on the Mexican side of the bridge, across the Rio Grande marking the border. No examination was made of my baggage and then we waited around in the car for about ten minutes. Julio returned and we started onward. When we reached the bridge, which as heretofore stated marks the boundary between the U. S. A. and Mexico, our car was flagged. We stopped and the front door opened. A man entered with a badge in his hand and stated that he was a United States agent and he remained in the car. When we arrived at the United States Customs I was directed to sign a card after they searched my baggage and myself. They handcuffed me and placed me in jail where I remained for five days, after which time I was taken to New York City.

MORTON SOBELL.

(Sworn to before me this [illegible] day of April, 1951.)

APPENDIX V

Excerpts from Prosecution's Brief on the Original Appeal to the Court of Appeals

Page 34:

Sobell claims that this testimony and his affidavit were enough to require the trial court to hold a hearing to determine whether his arrest in Mexico and subsequent transportation to Texas were "acts done or participated in by officers of the United States," and that the court's refusal to do so was error. Sobell's Brief, p. 63. We maintain, *first*, that Sobell forfeited any right to question the court's jurisdiction of his person by going to trial on the merits without objection; *second*, that Mexico had every right to expel Sobell without ceremony, and that even if United States agents requested such expulsion (of which there is no proof), it would not render it unlawful; and *finally*, that even assuming that Sobell was brought before the court below by unlawful means, the court did not lose jurisdiction.

Pages 38-39:

B. *Mexico had a right summarily to expel Sobell, and even if it be assumed,* arguendo, *that the United States requested his expulsion, such request did not render the action unlawful.*

Putting to one side the question of waiver, and turning to the merits of Sobell's motion, we find the evidence undisputed that his expulsion from Mexico was the act of the Mexican police (1525-26; 2410-14).* There is not a shred of evidence that any United States agent assisted the Mexicans in this act. Nor is there anything in the record to indicate that the United States Government procured

* Under this and the next subheading we assume, *arguendo*, the truth of the allegations contained in Sobell's affidavit.

the Mexican Government to deport Sobell. The most that appears is that the F. B. I. was waiting for Sobell in Laredo when he was delivered by Mexico into the hands of the United States Immigration Service. From this it may be inferred that the Mexican authorities had alerted the F. B. I. to expect Sobell's arrival, but it by no means follows that the Bureau was the instigator of Sobell's ouster.

That Mexico had a perfect right to expel Sobell, an alien fugitive from justice, is settled beyond permissible dispute:

> "It will not be for a moment contended that the government of Peru could not have ordered Ker out of the country on his arrival, or at any period of his residence there. * * *
>
> "Nor can it be doubted that the government of Peru could of its own accord, without any demand from the United States, have surrendered Ker to an agent of the State of Illinois, and that such surrender would have been valid within the dominion of Peru." *Ker* v. *Illinois*, 119 U. S. 436, 442 (1886). See also *Chandler* v. *United States*, 171 F. 2nd 921, 935 (1st Cir. 1948), cert. denied, 336 U. S. 918 (1949).

Mexico, of course, could exercise that right in any manner it desired, and we are referred to no provision of Mexican law which interdicts the summary procedure that was followed (as we are assuming) in the case of Sobell. While kidnapping may be a criminal offense in Mexico, summary deportation of a fugitive from justice is hardly tantamount to kidnapping.* Since Mexico acted lawfully in effecting Sobell's expulsion, even if we were to make the unproved assumption that the United States requested Mexico to sur-

---

* Even if it is true, as Sobell alleges, that he was beaten by the Mexican police, such mistreatment would hardly invalidate his deportation.

render Sobell, it would not render Mexico's action any the less lawful. At worst, the United States would then be in a position of having counseled the commission of a lawful act. Surely a fugitive from justice who is willingly surrendered by the country of his asylum to the country where he is wanted derives no immunity from prosecution by reason of the latter's request for his surrender. Cf. *Ker v. Illinois, supra; Chandler v. United States, supra.*

C. *In any event, the jurisdiction of a federal court in a criminal case is not impaired by the manner in which the accused is brought before it.*

We sought to demonstrate above that there was nothing unlawful about the manner in which Mexico rid herself and the United States acquired custody, of Sobell. Here we shall show that even if Sobell was uprooted from his asylum and surrendered to the United States by unlawful means, the court below still had power to try him.

Page 41:

In the last analysis, however, we do not think that this Court need pass on the question of law which the Supreme Court has left open. For even if the rule were as Sobell would like it, he would not be in a position to invoke it, since it presupposes wrongful conduct on the part of a federal officer and there is not a scintilla of evidence of any such conduct here.

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FILED
OCT 15 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

Nos. 440 and 441

MORTON SOBELL,

Petitioner,

v.

UNITED STATES OF AMERICA.

REPLY TO GOVERNMENT'S OPPOSITION

FRANK J. DONNER,
ARTHUR KINOY,
MARSHALL PERLIN,
342 Madison Avenue,
New York, New York,

BENJAMIN DREYFUS,
703 Market Street,
San Francisco, California,

Attorneys for Petitioner.

Of Counsel:
FRANK J. DONNER,
ARTHUR KINOY,
MARSHALL PERLIN,
BENJAMIN DREYFUS,
LUIS SANCHEZ PONTON,
University of Mexico,
Mexico City, Mexico.

IN THE

Supreme Court of the United States

October Term, 1957

Nos. 440 and 441

MORTON SOBELL,

Petitioner,

v.

UNITED STATES OF AMERICA.

REPLY TO GOVERNMENT'S OPPOSITION

No. 440

1. At the core of both of our motions are newly presented allegations based upon recently obtained evidence that (a) the United States Government initiated, arranged and participated in the abduction of petitioner from Mexican territory; and that (b) the Government of Mexico neither deported nor expelled petitioner nor consented in any way to his seizure and removal. These allegations are no mere general charges but are based upon particularized factual claims (A. 16, 21-22, 25, 27, 28-29, 30, 36, 38; Exhs. 3, 4, 5, 7, 8, 9, 10, 11), which the Government has never denied.

2. Indeed, throughout these proceedings the Government has skillfully refrained from directly disputing or controverting these basic allegations. It has either ignored them, distorted them by equating them with altogether different contentions, or dealt with them indirectly so as to challenge their validity without seeming to do so. While such a response to our allegations is a neat solution to the problem of discrediting them without conceding the propriety of a hearing, its consequences are misleading and confusing. In its Opposition to both our petitions the Government has persisted in this tactic.

3. A prime example of the resort to this technique is the Government's argument (Opp. 19) that there was no perjury. But such a claim could only be made by ignoring the allegations in our Motion (A. 27-28) that the Chancellor of the Mexican Consulate at Laredo had specifically informed the witness Huggins that the Government of Mexico had not deported petitioner and that his abduction had taken place without the knowledge or approval of the Mexican Government. The Government does not mention this allegation—let alone deal with it in any way.

4. Equally strange is the Government's failure to respond to our contention (Pet. in No. 440, p. 29) that the prosecution knew that the entry on the manifest card was false and to our further contention (*Ibid.*, p. 30) that the Court of Appeals improperly denied our motion to amend the record to include an official statement by the Government of Mexico that petitioner's expulsion had never been ordered by the department officially charged with responsibility in this area.

5. It is now "entirely clear" to the Government and to the trial judge (Opp. 20) that the use of the terms "deportation" and "deported" merely denoted an involuntary return. But as we have shown (Pet. in No. 440, pp. 12, 32), the Court of Appeals which reviewed the conviction stated that evidence had been introduced "to show that Sobell had been legally deported".* It hardly matters whether the jury concluded that petitioner had been deported from Mexico pursuant to all the procedural requirements of Mexican domestic law or that he had been merely "expelled" by the Mexican authorities. The fact is that they were given the false impression that peti-

* This conclusion of the Court of Appeals which the Government's Opposition does not mention is presumably to be swept under the rug together with the allegations of the motions which are embarrassing to its case.

tioner was brought to trial as a result of the official efforts of the Mexican Government engaged in cooperation with the United States for the protection of hemispheric security. This impression was based upon evidence which the prosecution knew was false and it was massively prejudicial.

6. As the Court will readily recognize, the Government's contention (Opp. 11-13, 21) that the facts upon which the motion rests were known to the defense characteristically disregards the allegations of the motion to the contrary (A. 74). Indeed, these were the very facts which the prosecution suppressed.

No. 441

7. The Government's argument that petitioner previously litigated the claim made here that a violation of the Treaty of Extradition with the Government of Mexico deprived the trial court of jurisdiction to proceed against petitioner again falls back on a convenient disregard of our newly presented allegations with respect to the total absence of Mexican governmental action as well as the responsibility of United States agents for petitioner's abduction. How could the courts have "necessarily considered the question of jurisdiction over the subject matter" (Opp. 25) *sua sponte* when the Government, which alone had access to them, suppressed the facts which gave rise to the question? And the Government's additional argument of waiver likewise truncates our contentions to make them conform to its Procrustean bed of personal jurisdiction.

8. Having converted the issue into one of personal jurisdiction, the Government argues that in any event there was no basis for a claim of lack of personal jurisdiction because there was legitimate reconduction. Accord-

ing to the Government, "Mexico had the unquestioned right to reconduct petitioner from its territory with or without cause or procedural protection" (Opp. 27). But our allegations, which the Government does not dispute, show that the individuals responsible for the abduction were not acting in an official capacity, but purely as agents of the United States Government; and that far from exercising its "unquestioned right" to oust petitioner, the Mexican Government formally and officially disclaimed that it had ordered petitioner's expulsion. And, as we have shown, while the case was pending below a second disavowal of official action was offered in support of petitioner's contentions and improperly rejected by the Court of Appeals.*

9. The Government further contends (Opp. 28-29) that as a matter of international law an individual who is removed from a country in violation of an extradition treaty can never complain in a criminal trial of lack of jurisdiction over his person or of lack of national jurisdiction in the court. To this broadside contention the Government concedes that the situation presented by the *Rauscher* case is an exception. But if one sort of violation of an extradition treaty (a) deprives the courts of total jurisdiction and (b) gives the defendant in a criminal case the right to raise the question, obviously the instant violation of the extradition treaty must have precisely the same consequences. It would make an extradition treaty meaningless if a defendant in a criminal case extradited for the wrong crime is entitled to attack the jurisdiction of the court, but not where the extradition treaty is flagrantly violated by a resort to self-help.

Moreover, it is neither sound international law nor wise foreign relations to view the provisions of a treaty

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* These circumstances, of course, decisively distinguish the *Savarkar* case upon which the Government relies (Opp. 28).

of extradition as the raw material for international incidents or diplomatic protests. These provisions are an indefeasible part of the rights of every accused and are incorporated into local law. Writers on international law uniformly agree that the violation of a treaty of extradition produces effects not only upon the public relations of the interested nations but also upon any concrete actions which derive from such violations.*

10. To the unanswerable analysis of Mr. Justice Brandeis in the *Cook* case, the Government responds that it was a civil case and that it involved a foreign vessel and foreign nationals. But these distinctions play no part in the case and have no bearing at all upon the scope and applicability of an extradition treaty.

The Court must recognize that the Government has organized its contentions into a framework which confounds problems of personal jurisdiction and due process with problems of a wholly different order which are raised by the violation of a treaty. The "manner in which a criminal defendant is brought before the court" rubric simply cannot unify the issues in these two wholly dissimilar areas. This is not to say that there is no overlap in the sense that a court which is lacking in total jurisdiction also lacks jurisdiction over the person, but it is to insist that what is involved here is a treaty and not a domestic law or due process requirement. If, as we contend, the

* Garcia-Mora, *International Law and Asylum as a Human Right* (1956), p. 135; Lauterpacht, *Recognition in International Law* (1947), pp. 420, 425; Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 27 Am. J. Int. L. 231, 244 (1933); Harvard Research in International Law, *Apprehension in Violation of International Law*, 29 Am. J. Int. L., Supplement, July, 1935; Carnegie Endowment for International Peace, *Resolutions of the Institute of International Law* (1916), "Resolutions of Oxford on Extradition," 1880, Article 26, p. 45, and amendment, 1894, p. 111.

treaty was in fact violated, the court which tried petitioner was as completely drained of jurisdiction as the court which tried *Cook* and *Rauscher*. And the Government's adulterous melange of cases and quotations drawn from other areas and unrelated fields cannot change this fact.

11. The important issues presented by this case with respect to the rights of a defendant who has been seized and tried in violation of a treaty are a product of the pervasive tension between the extralegal methods of counter-intelligence and the requirements of a treaty and of international law. They cannot be brushed aside by the truly amazing claim that no meaningful legal consequences are produced by such a violation. We earnestly submit that neither the Government nor the courts below have considered our motion based on a violation of the treaty of extradition in the light of appropriate legal standards.

Respectfully submitted,

FRANK J. DONNER,
ARTHUR KINOY,
MARSHALL PERLIN,
342 Madison Avenue,
New York, New York.

BENJAMIN DREYFUS,
703 Market Street,
San Francisco, California,

Attorneys for Petitioner.

Of Counsel:
FRANK J. DONNER,
ARTHUR KINOY,
MARSHALL PERLIN,
BENJAMIN DREYFUS,
LUIS SANCHEZ PONTON,
University of Mexico,
Mexico City, Mexico.

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IN THE

Supreme Court of the United States

October Term, 1957

Nos. 440 and 441

MORTON SOBELL,

Petitioner,

v.

UNITED STATES OF AMERICA.

SUPPLEMENTARY MEMORANDUM

Subsequent to the filing of our reply memorandum, certain actions by the Government have been brought to our attention which underscore the necessity for granting petitioner the hearings requested in the pending petitions for writ of certiorari.

On October 15, 1957, during the pendency of this case, a nationally distributed magazine published an extensive article * which reported that Attorney General Herbert Brownell, Jr., in December, 1956, ordered Assistant Attorney General William F. Tompkins to prepare a full report of the factual background of this case, based in part upon "previously unreleased facts." An eight-month long investigation has resulted in the preparation of a report, which, as the article states, will be released to the public. This report was made available to this national magazine. The writer of the article "was aided in his research by Government Attorney A. Warren Littman" and Benjamin F. Pollack, a Justice Department attorney. The magazine was "given access to the extensive data that went into the

---

* *Look*, October 29, 1957, pp. 86-105.

Government report of which this article is an exclusive preview."

The claimed purpose of this report is to prove to the public that petitioner is guilty and that attacks upon the judgment are unwarranted.

The article states that the Department of Justice has evidence in its files, including "previously unreleased facts," establishing *inter alia* that petitioner was apprehended in Mexico and "deported as an undesirable alien." The Court will note that this statement deals with one of the essential factual issues underlying both pending petitions. This is one of the issues which petitioner maintains must be resolved in the course of a judicial hearing.

The Government has consistently refused to deny the central allegations of the petitions. Rather it has obliquely attempted through its briefs and oral arguments to discredit them. In this way it has sought to resolve them favorably to itself and at the same time circumvent the requirements of a hearing. So far it has been successful in the use of this technique, for both the district court and the Court of Appeals (see Pet. in No. 440, pp. 25-26, 33-34) proceeded as if a hearing had already been held and the Government had demonstrated that petitioner's allegations were unsubstantiated.

If the factual allegations of a petition under Section 2255 are not conclusively refuted by the files and records of the case, a hearing must be granted. The Government obviously is not content to rely upon the files and records of this case, but chooses to refute petitioner's contentions on the basis of "previously unreleased facts." If the Government is in a position to deny our allegations, such denials should be made by sworn statements in a court of law where they will be subjected to judicial inquiry. Press releases and reports issued to national magazines do not provide an adequate substitute.

It is distressing that the Government, while attempting to avoid a proper determination of the issues in a court, has resorted to polemics in a national magazine concerning a case which is *sub judice*. Surely, in this, of all, cases, the demands of fair play should not have been thus ignored. It is grossly unfair to petitioner to deny him a hearing, routinely granted upon comparable allegations in other cases, and at the same time to attack him and to insist upon his guilt upon the basis of evidence which the Government refuses to subject to judicial scrutiny. The Government should be directed to present its facts in the appropriate manner and forum. The petitions for writs of certiorari should be granted and hearings ordered on petitioner's allegations.

Respectfully submitted,

FRANK J. DONNER,
ARTHUR KINOY,
MARSHALL PERLIN,
342 Madison Avenue,
New York, New York.

BENJAMIN DREYFUS,
703 Market Street,
San Francisco, California,

Attorneys for Petitioner.

Of Counsel:
FRANK J. DONNER,
ARTHUR KINOY,
MARSHALL PERLIN,
BENJAMIN DREYFUS,
LUIS SANCHEZ PONTON,
University of Mexico,
Mexico City, Mexico.

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Nos. 440 and 441

In the Supreme Court of the United States

OCTOBER TERM, 1957

MORTON SOBELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
WILLIAM F. TOMPKINS,
Assistant Attorney General,
PHILIP R. MONAHAN,
CARL G. COBEN,
BRUCE J. TERRIS,
Attorneys,
Department of Justice, Washington 25, D. C.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court[1] (A. 197–228)[2] is reported at 142 F. Supp. 515. The opinion of the Court of Appeals (Pet., No. 440, App. 2–12) is reported at 244 F. 2d 520.

[1] The District Court decided both of the two 28 U. S. C. 2255 motions herein involved in a single opinion. The Court of Appeals, similarly, disposed of both appeals in a single opinion and we respond to both petitions in this single brief in opposition.

[2] In conformance with the method adopted by petitioner, we shall designate with the letter "A." references to the current record on appeal, and with the letter "R." references to the printed record of the original trial (Nos. 111 and 112, O. T. 1952). The petitions for writs of certiorari will be referred to as "Pet., No. 440" and "Pet., No. 441," and the appendices to these petitions as "Pet., No. 440, App." and "Pet., No. 441, App."

JURISDICTION

The judgment of the Court of Appeals (Pet., No. 440, App. 1) was entered May 14, 1957. A petition for rehearing was denied on June 3, 1957. On August 28, 1957, Mr. Justice Harlan extended the time for filing petitions for writs of certiorari to and including September 10, 1957. The petitions were filed on September 9, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. The question presented in No. 440 is whether, on the basis of the allegations of petitioner's motion under 28 U. S. C. 2255, charging that his conviction of conspiracy to commit espionage was obtained through the knowing use of perjured testimony, he was entitled to a hearing for the introduction of testimony, or whether "the files and records of the case conclusively show" that he "is entitled to no relief."

2. The question presented in No. 441 is whether, on the basis of the allegations of another motion filed by petitioner under 28 U. S. C. 2255, charging that he was expelled from Mexico by the Mexican Secret Police at the instance and through the collusion of agents of the United States government, by means which were allegedly in violation of a treaty of extradition between the United States and Mexico, and by which means he allegedly came within the jurisdiction of the trial court, petitioner was entitled to a hearing to inquire into the truth of these charges with a view to determining whether the trial court had jurisdiction

to try him, or whether "the files and records of the case conclusively show" that he "is entitled to no relief."

STATUTE INVOLVED

Title 28, U. S. C., Section 2255 provides:

§ 2255. *Federal custody; remedies on motion attacking sentence.*

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the

judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

* * * * * *

STATEMENT

On March 29, 1951, petitioner and two co-defendants, Julius and Ethel Rosenberg, were found guilty by a jury verdict, returned in the United States District Court for the Southern District of New York, of conspiracy to commit espionage, in violation of former 50 U. S. C. 32 and 34 (now 18 U. S. C. 794) (R. 1579). On April 5, 1951, a motion in arrest of judgment, which raised for the first time the question of the court's jurisdiction over petitioner was denied. See *infra*, pp. 11–13. On April 5, 1951, petitioner was sentenced to thirty years' imprisonment (R. 30). His conviction was thereafter affirmed by the Court of Appeals for the Second Circuit in *United States* v. *Rosenberg*, 195 F. 2d 583, certiorari denied, 344 U. S. 838.

On May 8, 1956, pursuant to 28 U. S. C. 2255 (see pp. 3–4, *supra*), petitioner filed in the trial court, a mo-

tion (A. 8–40) to vacate and set aside his conviction and sentence, alleging that the prosecution had knowingly used perjured testimony at his trial, made false representations to the court, and suppressed evidence which would have impeached testimony given against him (A. 10). It is this motion which gave rise to the proceedings in No. 440.[3] On May 25, 1956, likewise pursuant to 28 U. S. C. 2255, petitioner filed, in the same court, a second motion[4] (A. 79–87) to vacate and set aside his conviction and sentence on the ground that the criminal proceedings against him had, allegedly, been instituted "in violation of the Constitution and laws of the United States, including *inter alia* the extradiction treaty between the United States and Mexico" (A. 80),[5] with the alleged consequence that the United States and its courts "thereby lacked all sovereignty and power" to conduct those proceedings (A. 81). It is this motion which gave rise to the proceedings in No. 441.

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[3] The charge of conscious use of perjurious testimony, relating to other matters, was also the subject of one of the two prior applications under Section 2255, in which petitioner joined, and which were found to be without merit. *United States v. Rosenberg*, 108 F. Supp. 798, 804 (S. D. N. Y.), affirmed, 200 F. 2d 666 (C. A. 2), certiorari denied, 345 U. S. 965. For a partial list of the judicial proceedings involving attempts to set aside petitioner's conviction, see A. 95–97; see also Memorandum for the United States in Opposition, No. 112, O. T. 1952, filed herewith, p. 2.

[4] This motion was, therefore, petitioner's fourth application under Section 2255, see fn. 3, *supra*.

[5] Petitioner referred in his petition to the "Treaty on Extradition signed on February 22, 1899, at Mexico City, 31 Stat. 1818" (A. 80).

Affidavits in opposition to these motions were filed by the Government (A. 41–64, 88–106), and reply affidavits were filed by petitioner (A. 65–77, 107–110). Thereafter, on June 20, 1956, following oral argument of both motions (A. 111–196), the District Court (Judge Irving R. Kaufman, who had presided at petitioner's trial) denied both motions (A. 197–228), setting forth in detail, in a "well reasoned and comprehensive opinion" (Pet. No. 440, App. 4), the reasons why, in the court's judgment, "[t]he motions and the files and records of this case show conclusively that the prisoner is entitled to no relief" (A. 226).

On May 14, 1957, the decision of the District Court was unanimously affirmed by the Court of Appeals for the Second Circuit (Pet., No. 440, App. 2–12).

Before considering the specific allegations of the two Section 2255 motions which gave rise to these proceedings, it will be necessary to set forth certain background facts.

1. THE NATURE OF THE EVIDENCE ADDUCED AGAINST PETITIONER AT THE TRIAL

The evidence against petitioner fell into two categories. First, Max Elitcher, a close friend of petitioner, testified that petitioner had taken an active part in the conspiracy and had attempted to get him to reveal secret information concerning the national defense (R. 197–263). This testimony was described by the trial judge, in his opinion denying the instant

motions, as "totally damning and convincing" (A. 214).*

The second category of evidence against petitioner was evidence tending to indicate an intent on his part to flee to Europe via Mexico, which was received as indicative of consciousness of guilt. Judge Kaufman, in his opinion denying the instant motions, summarized the major part of this evidence as follows (A. 214–216):

> * * * It had been brought out previously by David Greenglass that Julius Rosenberg, the head of the espionage ring, had urged him and his family to flee if the FBI started to close in, and had given Greenglass $4,000 to flee to Mexico and thence to Europe via Tampico (R.† 522–537). Subsequently, it was established that Sobell had gone to Mexico with his family in the Spring of 1950. He had gone openly and under his own name; however, it was shown without contradiction that while in Mexico Sobell traveled to both Tampico and Vera Cruz using aliases; that he had inquired as to how he might leave Mexico for Europe without proper papers; that while in Tampico and Vera Cruz he had enclosed letters to his wife in

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*Elitcher "was subjected to an intensive and exhaustive cross-examination," which "lasted two days and occupied 121 pages in the printed record" (A. 214; see R. 264–379, 388–394). The jurors were specifically instructed that if they did not believe Elitcher they were to acquit petitioner (R. 1566; A. 214).

†Judge Kaufman's "R." references, like ours, refer to the printed trial record.

Mexico City in unmarked envelopes sent to a neighbor; and that while in Mexico he had sent letters to his family in America, not directly, but enclosed in envelopes which listed false names as return addresses, and he had sent these envelopes to a friend requesting that he forward the letters. These facts were brought out by six disinterested witnesses, and the defense made no attempt to cross-examine them and even conceded the use of several of these different aliases.

William Danziger, an old friend of Sobell's, testified that he had received letters from an Mr Sowell and M. Levitov as the return addresses residing in Mexico; that he had opened them and found a note from Sobell requesting that he forward the enclosed letters to other members of the Sobell family. Sobell also requested Danziger to tell another relative that Sobell could be reached under the name of M. Sowell at a specified street address in Mexico. Danziger was not cross-examined (R. 857–867).

Thereafter, the government called to the stand Manuel Giner De Los Rios, a neighbor of the Sobells in Mexico City. De Los Rios testified that Sobell had approached him for information as to how a person could leave Mexico without papers, saying that he was afraid to return to the United States because he did not want to go back into the Army, having already experienced one war (R. 922). It was subsequently shown that Sobell had never been in the Army, having been continually deferred (R. 955). De Los Rios also testified that So-

bell had left his family and traveled to both Tampico and Vera Cruz. He knew this because during Sobell's absence, he had received two unmarked envelopes bearing postmarks from those two cities; inside each he found a letter beginning "Dear Helen" (the name of Sobell's wife), and he had turned both letters over to Mrs. Sobell. Again there was no cross-examination (R. 924–926).

Subsequently, Minerva Bravo Espinosa, a clerk in a Vera Cruz optical store, testified that Sobell had ordered a pair of glasses from her using the name M. Sand, and defense counsel conceded this fact (R. 927–930). Similarly, Jose Broccado Vendrell testified that Sobell had registered at his hotel in Vera Cruz as Morris Sand; again this fact was conceded and there was no cross-examination (R. 931–932). Dora Bautista, a hotel clerk in Tampico, testified that Sobell had registered in her hotel as Marvin Salt, and this too was conceded (R. 933–934). Glenn Dennis, an official of the Mexican Airlines, was called to testify, and via his testimony and defense concessions it was established that Sobell had flown from Vera Cruz to Tampico under the name of N. Sand, and from Tampico to Mexico City under the name of Morton Solt (R. 935–938).

"Not once during the trial," as Judge Kaufman notes, "did the defense attempt to explain the strange actions of this man and thus eradicate the impression of flight and guilty consciousness thus created. In summation defense counsel merely referred to these

actions as 'a brainstorm' which he said was none of anyone's business (R. 1503–1504)" (A. 216–217).*

2. THE ALLEGEDLY PERJURIOUS TESTIMONY

The testimony which petitioner claims to have been perjurious, and the perjurious character of which he says the Government knew when it adduced it (see *infra*, pp. 13–18), was that of James S. Huggins, an immigration inspector at Laredo, Texas, to whom petitioner was delivered on the occasion of his being forcibly ejected from Mexico by the Mexican Secret Police on the morning of August 18, 1950. The nature of Huggins' testimony and the circumstances under which it was given are summarized in the opinion below of Judge Kaufman as follows (A. 217):

> Immediately after these "flight" witnesses were called, the government attempted to introduce an immigration manifest card noting

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* Petitioner has personally admitted under oath his use of aliases in Mexico and the making of inquiries about passage to Europe and South America. In an affidavit dated September 23, 1953, filed with the Court of Appeals for the Second Circuit, in opposition to the Government's motion to affirm the denial by the District Court of a previous Section 2255 motion, petitioner stated (A. 49, 167):

> * * * I left the family in the Mexico City apartment and travelled around Mexico to Vera Cruz and Tampico, even using false names and inquiring about passage to Europe and South America for all of us.

His affidavit continued (A. 167):

> It is hard to understand how I might have been allowed to do such a stupid thing but it did not take long for me to recognize how inept and pointless it was. Of course I had no idea how it could be misinterpreted and how dangerous it would turn out to be. * * *

Sobell's return to the United States; the card was marked "deported from Mexico". The government attempted to introduce it as a record made in the ordinary course of business by the Immigration Service, but upon objection, the card was not allowed into evidence until the following day when James S. Huggins, the Immigration Inspector who had filled out the card, was flown to New York from Texas to authenticate it. He testified that the card was made out in the regular course of his duties, that he had obtained the information on it from Sobell himself when Sobell was brought to the border, except for the information regarding Sobell's "deportation". He explained that he had made the notation based on his *personal observation* that Sobell had been brought across the border by Mexican police. Despite repeated insistent questioning by defense counsel, he never suggested that he had made the entry because of any official information given him by the Mexican authorities or agents. He reiterated that the entry was based solely upon his observations at the time, and that he obtained Sobell's signature by telling him that all deportees must sign such cards (R. 1025–1037). [Emphasis in the original.]

3. THE MOTION IN ARREST OF JUDGMENT

Though both petitioner and his wife were well aware, before and during the trial, of the circumstances under which petitioner was allegedly taken from his Mexico City apartment by Mexican Secret Police and delivered at the border to immigration inspector Huggins and waiting agents of

the Federal Bureau of Investigation (A. 22–24; R. 31–33), neither he nor his wife nor his attorneys made any move, either before trial or during the trial, by motion, testimony, or even by cross-examination of the witness Huggins, to bring these alleged facts to the attention of the court (A. 219–223). Petitioner first brought these alleged facts to the court's attention in a motion and supporting affidavit in arrest of judgment (R. 31–33, 1587–1599), filed April 4, 1951 (R. 33), six days after the jury's verdict of guilty, and the day prior to the imposition of sentence.* The motion was denied (R. 1599), and the denial affirmed on appeal (*United States* v. *Rosenberg,* 195 F. 2d 583, 602–603 (C. A. 2), certiorari denied, 344 U. S. 838). Speaking for the Court of Appeals, Judge Frank, after pointing out that Rule 12 (b) (2) of the Federal Rules of Criminal Procedure requires that "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial" and that "[f]ailure to present any such defense or objection as herein provided constitutes a waiver thereof," and after noting that petitioner had made no such pre-trial motion despite the fact that "all the information con-

* At the hearing below, in reply to the court's query, "Why didn't the defense * * * raise the question of lack of personal jurisdiction if this was all true," counsel for petitioner replied that "that is something that would have to be asked of" petitioner's trial counsel (A. 134).

tained in the post-trial affidavit was known to him at that time" (195 F. 2d at 603), observed:

> He preferred to take his chances on the verdict, withholding his trump card until the trial was over. The Federal Rules of Criminal Procedure allow no such tactic. (*Ibid.*)

4. THE INSTANT MOTIONS

(*a*) *The motion charging the knowing use of perjured testimony.*—On May 8, 1956, as we have previously noted, petitioner filed a motion under 28 U. S. C. 2255 (the motion involved in No. 440) charging that his conviction was null and void on the grounds that, allegedly, the prosecution had knowingly used perjured testimony against him at his trial, suppressed evidence helpful to his defense, and made false representations to the court (A. 8–40).

Briefly summarized, the motion alleged as follows: That petitioner, his wife, and their two children, on June 22, 1950, departed from the United States "on a trip for Mexico" (A. 21, 23); that, prior to departure, they had obtained "tourist cards" in their own names from the Mexican Consulate (A. 21); that petitioner had purchased the airplane tickets in his own name, the manifest of the air flight bore his true name, and on his arrival in Mexico he rented living quarters in his true name (A. 21–22); that he "would have voluntarily returned to the United States, had it not been for his unlawful abduction on August 16, 1950" (A. 22); that on the latter date, while he and his family were having supper in their Mexico City apartment, "[t]hree Mexicans in civilian clothes, who iden-

tified themselves as officers of the Secret Police of the Federal District of Mexico," after knocking and being admitted to the apartment, seized him and accused him of robbing a bank in Acapulco (A. 22); that they "seized and refused to return the credentials he tendered to establish his identity" (A. 22); that he was physically assaulted (A. 22); that he "was taken to the offices of" the Federal District of Mexico, where he was kept under guard until early the following morning, August 17th (A. 22); that throughout this time "no legal proceedings were held, no hearing was conducted, nor was [he] presented with any charges or warrant of arrest or written authority for the action taken" (A. 23); that on August 17th he and the other members of his family were placed under guard in two automobiles, which proceeded northward (A. 23); that on August 18th, after a day of continuous driving, during which periodic stops were made, on which occasions one of the guards would make a telephone call, they arrived in Nuevo Laredo on the Mexico-Texas border (A. 23); that on the Mexican side of the border, an agent of the Federal Bureau of Investigation "entered the automobile" in which petitioner was riding "and instructed the driver to continue to the United States immigration office in Laredo, Texas" (A. 23); that this agent "stated he had been waiting for petitioner for many hours" (A. 23); that at the United States immigration office petitioner "was removed from the car by the FBI agent and taken before the witness Huggins [the immigration inspector who gave the allegedly perjurious testimony (see *supra*, pp. 10–11)] and was told to sign a card" (A. 23);

that he was then immediately placed in custody by another FBI agent [10] (A. 23–24); that his and his wife's baggage were examined and various objects removed (A. 24); that "[i]n petitioner's presence, one of the Mexican Secret Police turned over to the FBI the personal documents that had been unlawfully taken from him in Mexico City" (A. 24); that petitioner informed both the arresting FBI agent and Huggins "of his unlawful abduction by the Mexican secret police" (A. 24, 37); and that he was thereafter taken to the office of a United States Commissioner, where FBI agents showed petitioner personal effects which had been taken from his person and apartment in Mexico and "questioned him in respect thereto" (A. 24).

The motion further alleged that at the time of his arrival at the immigration office in Laredo "[h]is appearance clearly indicated that he had been physically assaulted" (A. 37); that the FBI agents and Huggins "were aware that the required [Mexican] deportation procedures had not been complied with" (A. 37); that within a day of petitioner's arrival "Huggins and other employees of the United States immigration office * * * were informed by Hector Rangel Obregon, chancellor of the Mexican consulate at Laredo, that petitioner had not been deported [*i. e.*, by the duly constituted Mexican immigration

[10] The motion alleged that "[p]etitioner was arrested without a warrant" (A. 24). However, a warrant for petitioner's arrest had been outstanding since August 3, 1950 (A. 92). The arresting officer need not have the warrant in his possession at the time of the arrest (Rule 4 (c) (3), F. R. Crim. P.).

authorities]" (A. 27); that Obregon "expressed concern and alarm that this matter had been handled without the knowledge or approval of the Mexican Government or its duly constituted authorities" (A. 27); that the prosecution "was fully informed of the circumstances of petitioner's seizure, from the abduction in Mexico to the time he arrived in Laredo" (A. 28); and that the FBI agent who arrested petitioner in Laredo (A. 23–24) "aided the prosecution in its pre-trial preparation" and "sat at the prosecution's table throughout the trial" (A. 28).

On the basis of these and other alleged facts set forth in the motion, the motion charged that, "The prosecution in the course of the trial introduced evidence to prove that petitioner was deported by the Government of Mexico. The testimony in support of this contention was perjurious; the documentary evidence tendered in support thereof was false."[11] This false evidence was essential to the prosecution's entire case against petitioner. The prosecution, knowing this evidence to be false and perjurious, willfully and intentionally used it to the prejudice of petitioner * * *" (A. 11).

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[11] The motion alleged that witness Huggins "testified that the information on the front portion of the record"—*i. e.*, the "immigration manifest card" (see *supra*, pp. 10–11)—"was furnished by petitioner, save for the notation 'Deported from Mexico.' This notation, according to the witness, was based on *information and observation* (R. 1027–1028)" (A. 13; emphasis added). However, as is clear from the very pages of the trial record which the motion cites—R. 1027–1028—Huggins testified that the notation in question was based on his own personal "observation" alone, and not on any "information" supplied him by anyone else.

On the matter of the pertinency of the allegedly false evidence, the motion averred that "[t]he evidence was used to represent falsely that petitioner would not have returned voluntarily to the United States" (A. 16); that in fact petitioner "would have voluntarily returned" "had it not been for his unlawful abduction" (A. 22); and that "[t]he prosecution used the false evidence of a deportation from Mexico to distort petitioner's innocent and lawful departure from the United States," "falsely pictur[ing] a desire to visit Mexico as a plan to avoid apprehension because of a consciousness of guilt" (A. 16–17).

The items of evidence helpful to his defense which petitioner charged had been suppressed by the Government (in addition to evidence tending to establish that petitioner had not been deported by the regularly constituted immigration authorities of the Government of Mexico) consisted of his "tourist card," evidencing his "lawful entry into Mexico" (A. 33), and his "vaccination certificate," which, it was asserted, "was obtained in preparation for his return to the United States" (A. 33)—these documents being among his personal effects which, according to the motion, were taken from petitioner at the time of his abduction and subsequent arrest (A. 33).

The allegedly false representations made to the court by the prosecuting attorney consisted of the latter's statements to the court, during oral argument on the motion in arrest of judgment (see *supra*, pp. 11–13), to the effect (1) that petitioner's affidavit in support of the motion in arrest "contains a falsehood in the statement that there was exhibited amongst other

things to the Mexican authorities visas. Counsel ought to know that his client never went into Mexico with a visa," and (2) that the same affidavit "portrays certainly that this defendant was not honorably escorted from Mexico, but that literally he was kicked out as a deportee" (A. 15). The motion charged that "[t]he representations that petitioner had entered Mexico without a visa (tourist card) and was subsequently deported by the Government of Mexico were both false * * *" (A. 15).

(*b*) ***The motion charging violation of the extradition treaty between the United States and Mexico.***—On May 25, 1956, petitioner filed the second Section 2255 motion herein involved (that presented in No. 441) (A. 79–87). It is similar to the first motion, adopting many of its allegations by reference, but bases the alleged invalidity of petitioner's conviction on the claim that the manner in which he was arrested constituted a violation of the 1899 Treaty of Extradition between the United States and Mexico (31 Stat. 1818) (A. 80, 84–86). By virtue of this alleged violation, the motion contends, "The United States itself, as well as its courts, thereby lacked all sovereignty and power to conduct the proceedings herein" (A. 81), with the alleged consequence that petitioner's conviction was null and void (A. 86).

ARGUMENT

The sole question presented by each of these petitions is whether the allegations made in the respective Section 2255 motions were such as to require a hearing for the taking of evidence on the issues raised, or

whether "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief" (28 U. S. C. 2255, *supra*, pp. 3–4, par. 3.) Judge Kaufman, in denying these motions (after full argument as to the sufficiency of their allegations (A. 111–196)), was, of course, well aware of the function of a Section 2255 motion (A. 202) and acted on the assumption that the court, "[i]n passing on these motions," should "accept all of petitioner's averments as true insofar as they are not inconsistent with the record" (A. 203). We submit that the decision of the trial judge (with which the unanimous Court of Appeals agreed) that "[t]he motions and the files and records of this case show conclusively that the prisoner is entitled to no relief" (A. 228) is clearly correct, and that, accordingly, the petitions for writs of certiorari present no question requiring further review by this Court.

1. THE MOTION CHARGING THE KNOWING USE OF PERJURY (PETITION FOR CERTIORARI NO. 440) IS WITHOUT MERIT

(*a*) We submit that there was no "knowing use of perjury" because there was, in fact, no perjury. We believe that, for the reasons set forth by Judge Kaufman (at A. 217–219), it sufficiently appears from the trial record itself that "Huggins' testimony was not perjurious, nor was the [immigration] manifest false, as it could rise no higher than Huggins' explanation regarding the 'deportation' notation" (A. 219). As noted by the trial judge, "petitioner's contention that Huggins perjured himself when he testified that Sobell had been deported as he then well knew that Sobell's seizure had been contrary to Mexican deporta-

tion procedure" is "clearly refuted by the cold record which shows that time after time Huggins insisted that his notation was not based on official sources, but was based solely upon his own observations of Sobell's summary ejection. It is entirely clear that he was using the word 'deported' to mean expelled or ejected, and clearly even Sobell must have understood the notation to have that meaning as he himself signed the card when told that all deportees must do so" (A. 217–218)."

Moreover, as Judge Kaufman further remarks, it "should also be noted that in summation, Mr. Kuntz, Sobell's attorney, pointed out that Sobell had not been legally deported from Mexico; he argued that if Sobell had been deported the government would have shown it by other more competent evidence (R. 1505–1506). When Mr. Saypol, the prosecutor, summed up, he nowhere stated—or even inferred—that Sobell had been legally deported, but stated instead that 'the FBI caught up with him and brought him back and you have him here' (R. 1534). Patently, this does not show an attempt by the prosecution to create the impression of legal deportation as is now charged. Manifestly, it was the prosecution's intention to use Huggins' testimony to point up that Sobell's return to this country had been involuntary. Thus it was the natural capstone to the clear and convincing testimony regarding Sobell's attempt to

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[8] It is to be noted, furthermore, that on the reverse side of the manifest card, under "Remarks," there appears the notation "Brought to Immigration office by Mexican police" (R. 1031).

flee. Obviously, the defense attorneys also believed this was the sole purpose of introducing that evidence. They did not even attempt to bring the question of improper deportation procedures to the attention of the Judge out of presence of the jury—a device they had frequently employed throughout the trial—despite the fact that 24 hours elapsed between the time defense counsel saw the immigration manifest and the time that it was finally introduced into evidence via Huggins' testimony" (A. 218–219).

(*b*) Nor did the Government "suppress" any evidence favorable to petitioner, as charged.

As noted by the trial judge, "the prosecution cannot suppress evidence or facts if they are known to the defense, and if it is true that Sobell was abducted, this fact was clearly and admittedly within the possession of Sobell and his counsel before the trial. Indeed, his affidavit makes it clear that Sobell knew that this alleged illegal seizure was highly irregular. The petitioner now alleges that the defense was not in possession of sufficient facts showing that the FBI had instigated this procedure as is charged now—but this is hard to believe in light of Sobell's assertions in his first affidavit, submitted in support of his motion in arrest of judgment [see R. 31–33]—that an FBI agent was waiting for him on the Mexican side" (A. 219–220).[12]

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[12] See also A. 220–221, where the judge points out that it would have been perfectly possible for petitioner to adduce at his trial the facts surrounding his forcible abduction from Mexico (and thus refute any idea that he had been formally deported by Mexico) without taking the witness stand himself

Similarly, there is no basis for petitioner's contention that the two documents which were taken from him—his "tourist card" and "vaccination certificate" (see *supra*, p. 17)—were suppressed by the prosecution. In the first place, as Judge Kaufman notes, "Sobell knew of the evidence" and "knew who had it," yet "never sought its production, though he sought the production of numerous other documents" (A. 223–224). Furthermore, "the two items in question were not material to petitioner's case" (A. 224).[*]

(*c*) With respect to the alleged misrepresentations by the prosecuting attorney to the court (see *supra*, pp. 17–18), it is sufficient for present purposes to point out that both alleged misrepresentations, as observed by Judge Kaufman, "were made * * * after the verdict

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(*e. g.*, by putting his wife on the stand, by cross-examining Huggins, etc.); but that, in any event, even if to do so had required his taking the stand, this would not have entailed the deprivation of any constitutional right, since "The Constitution," while it "safeguards the right of a defendant to remain silent," "does not assure him that he may remain silent and still enjoy the advantages that might have resulted from testifying" (*Stein* v. *New York*, 346 U. S. 156, 177).

[*] The "tourist card," as Judge Kaufman explains, "could have established merely that Sobell went to Mexico under his own name; this was never denied or mentioned by the prosecution, and was specifically referred to by Mr. Kuntz [petitioner's attorney] in summation. Further, defendant's exhibits in this motion indicate that Sobell's attorneys had manifests of the airline on hand which clearly showed he traveled in his own name. They obviously decided, for trial strategy, not to introduce them" (A. 224). "As for the vaccination certificate, Sobell claims this shows he intended to return to the United States as it would be necessary for re-entry; he neglects to mention that this was an international certificate equally valid and equally necessary for entry into many foreign countries" (A. 224).

had been rendered, upon argument of the motion in arrest of judgment" (A. 224). They accordingly could not in any event have influenced the verdict."

2. THE MOTION CHARGING VIOLATION OF THE EXTRADITION TREATY BETWEEN THE UNITED STATES AND MEXICO (PETITION FOR CERTIORARI NO. 441) SIMILARLY LACKS MERIT

This motion charged, in substance, that petitioner's alleged forcible abduction from Mexico by officers of the Mexican Secret Police, at the instigation or through the collusion of agents of the FBI, constituted a violation of the Treaty of Extradition between the United States and Mexico (31 Stat. 1818), which, in turn, had the effect of totally depriving the trial court of jurisdiction to try him for the offense of which he was convicted (A. 80–86). This argument was likewise rejected after thorough consideration by the trial judge (A. 204–213) as well as by the court below (Pet., No. 440, App. 10–12).

(*a*) At the outset, we submit that petitioner has already fully litigated this issue. Immediately after his conviction, as we have seen, he moved, in a motion in arrest of judgment, to set aside the conviction on the ground that the court lacked jurisdiction because he had been illegally brought before it (R. 31–33, 1596),

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[11] See also A. 224–225, where Judge Kaufman points out that (and explains why) (1) the prosecuting attorney's comments "had no effect on post-trial proceedings" (A. 224) and (2) "were not false" in any event (A. 225). In view of the fact that the allegedly false representations were made to Judge Kaufman himself, it is evident that the latter's appraisal both of their over-all significance in the case and of their truthfulness should be conclusive.

which motion was denied (R. 1599). The Court of Appeals, on the original appeal from petitioner's conviction, likewise fully considered this contention and held that the issue raised was one of jurisdiction over petitioner's person, which had been waived by his failure to raise it until after trial. *United States* v. *Rosenberg*, 195 F. 2d 583, 602–03 (C. A. 2).[20] And in his petition for certiorari to review the affirmance of his conviction, which this Court denied at 344 U. S. 838, the question of jurisdiction was again pressed (see A. 104–106). Both in his brief in the Court of Appeals and in his petition for certiorari, petitioner relied upon *United States* v. *Rauscher*, 119 U. S. 407, and *Cook* v. *United States*, 288 U. S. 102, the same two cases upon which he relies now (Pet., No. 441, pp. 10–14). While petitioner, to be sure, has now modified his argument from one of lack of personal jurisdiction to "a total failure of all national and hence judicial power" (Pet., No. 441, p. 28), and from alleged violation of international law to alleged violation of the treaty of extradition between the United States and Mexico (Pet., No. 441, p. 7–14), the substance of his argument remains unchanged. As Judge Kaufman observed (A. 208):

> It is clear that petitioner's present argument

[20] Petitioner's brief to the Court of Appeals on the original appeal fully argued the issue (see A. 98–103) under the heading (A. 98):

> THE UNITED STATES, AND HENCE THE COURT BELOW, HAD NO JURISDICTION OF THE PERSON OF SOBELL, SINCE HE WAS FORCIBLY SEIZED IN ANOTHER COUNTRY BY OR AT THE INSTANCE OF THE F. B. I., AND THE COURT BELOW SHOULD HAVE DIRECTED A HEARING ON THIS ISSUE.

> re jurisdiction is but a twice-told tale in a new semantic guise. He seems to believe that by the mere device of changing attorneys and relabeling his claims, he may return to court time after time with the same basic argument.

Furthermore, since a court is required to raise the question of jurisdiction over the subject matter on its own motion (*Defiance Water Co.* v. *City of Defiance*, 191 U. S. 184; *United States* v. *Bradford*, 194 F. 2d 197 (C. A. 2), certiorari denied, 343 U. S. 979), the District Court and the Court of Appeals, having been presented with the allegation of abduction and the argument of lack of jurisdiction, necessarily considered the question of jurisdiction over the subject matter as well as personal jurisdiction. An issue must be considered litigated where the basic subject has been presented to three separate courts even though counsel later develops slightly different legal phraseology.

(*b*) Though petitioner now labels the issue arising from the alleged abduction as one of jurisdiction over the subject matter as distinguished from jurisdiction over his person, it is clear that the real issue, nevertheless, is personal jurisdiction—which, as has been noted, he waived by failure to raise it until after his trial.[17] For, labels apart, the only issue is whether he

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[17] It is well settled that jurisdictional objections, except as to jurisdiction over the subject matter, are waived by failure to present them in a timely manner. *Albrecht* v. *United States*, 273 U. S. 1, 8–9; *Pon* v. *United States*, 168 F. 2d 373 (C. A. 1). Indeed, petitioner's counsel expressly conceded at the hearing below that "if we were dealing with the matter of personal jurisdiction, we are out of court" (A. 132).

was properly before the trial court. Two of the very cases relied upon by petitioner (Pet., No. 441, pp. 26–28) make it clear that the irregular seizure of a person involves only the question of personal jurisdiction. *United States* v. *Rauscher, supra,* 119 U. S. at 433 ("jurisdiction of the person"); *United States* v. *Ferris,* 19 F. 2d 925, 926–927 (N. D. Cal.) ("jurisdiction over the person").[18] *Ford* v. *United States,* 273 U. S. 593, 606, settles the question:

> The issue whether the ship was seized within the prescribed limit did not affect the question of the defendant's guilt or innocence. *It only affected the right of the court to hold their persons for trial.* It was necessarily preliminary to that trial. The proper way of raising the issue of fact of the place of seizure was by a plea to the jurisdiction. A plea to the jurisdiction must precede the plea of not guilty. Such a plea was not filed. The effect of the failure to file it was to waive the question of the jurisdiction of the persons of defendants. [Emphasis added.][19]

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[18] Petitioner's reliance on *Cook* v. *United States, supra,* 288 U. S. 102 (Pet., No. 441, pp. 26–27) is also misplaced. There, proper objection was made before trial (288 U. S. at 108), and the Court merely stated that such an objection is not "lost by the entry of an answer to the merits" (*id.* at 122).

[19] Petitioner attempts to distinguish *Ford* by claiming that "[t]here was no such jurisdictional issue in *Ford*, because there was no extraterritorial action or seizure in violation of the treaty. The seizures in *Ford* were made strictly in accordance with treaty" (Pet., No. 441, p. 28). This Court, however, clearly stated in *Ford* that "[t]he main questions presented are, first, whether the seizure of the vessel was in accordance with the treaty * * *"

(*c*) Finally, even if petitioner had raised the instant issue of personal jurisdiction in time, and conceding *arguendo* all of the facts alleged by petitioner in his motion, those facts would not have constituted a sufficient basis to oust the trial court of jurisdiction to try him. Petitioner admits that he was apprehended by officers of the Secret Police of the Federal District of Mexico and that he was taken to the offices of the *Direccion Federal de Seguridad* of the Federal District of Mexico (A. 22).[20] His wife and children were also seized by Mexican police officers and taken to their offices (A. 23). On the following day, according to the motion, petitioner and his wife and children were driven north in separate automobiles toward the United States, still in the custody of Mexican police officers (A. 23). Not until he reached the border was petitioner turned over to agents of the FBI (A. 23–24).

Since the authorities agree that there is no right of asylum in a foreign country even where there is an extradition treaty (*e. g., Ker* v. *Illinois,* 119 U. S. 436, 442), Mexico had the unquestioned right to reconduct petitioner from its territory with or without cause or procedural protection. See Article 33 of the Mexican Constitution, Pet., No. 440, App. 20–21; 1 Oppenheim, *International Law* (8th ed. Lauterpacht,

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(273 U. S. at 600). The statement quoted in the text, *supra,* was made on the assumption that the seizure had been illegal (*id.* at 605).

[20] The latter fact indicates that the reconduction of the petitioner to the border was participated in or approved by Mexican officials of considerable standing.

1955), § 326; Wheaton, *International Law* (6th ed. Keith, 1929), p. 210. While petitioner claims that his seizure and reconduction were the result of a plan organized and supervised by agents of the FBI (Pet., No. 441, p. 7), the substantial participation of Mexican officials is enough to bring the case within the above principle. Preuss, *Kidnapping of Fugitives From Justice on Foreign Territory*, 29 Am. J. of Inter. Law 502, 507. In the *Savarkar* case, reported in Scott, *Hague Court Reports* (1916), p. 275, the Permanent Court of Arbitration held that neither an extradition treaty nor international law obligated Britain to return to France a British fugitive who had escaped to France and been restored to a British ship through the cooperation of subordinate French and British police. The Permanent Court held that such cooperation by the French police, without immediate disavowal by their superiors, constituted legitimate reconduction. There thus exist no grounds for considering the forcible removal of petitioner from Mexico as in violation of either the extradition treaty or international law.

Moreover, even if petitioner was removed from Mexico in violation of the extradition treaty, it is well settled that, except for the totally different circumstances presented by the *Rauscher* case, discussed *infra* at pp. 30–31, jurisdiction over the person of a defendant in a criminal case is not impaired by the manner in which he is brought before the court. See Note, 165 A. L. R. 947. The federal courts have thus consistently held that only the government whose

sovereignty has been violated, not the defendant,[21] may validly protest a seizure illegal under either international law or extradition treaties. *E. g., Ker* v. *Illinois, supra,* 119 U. S. at 443, 444;[22] *Chandler* v. *United States,* 171 F. 2d 921 (C. A. 1), certiorari denied, 336 U. S. 918; *United States* v. *Unverzagt,* 299 Fed. 1015 (W. D. Wash.), affirmed, 5 F. 2d 492 (C. A. 9), certiorari denied, 269 U. S. 566; *United States* v. *Insull,* 8 F. Supp. 310 (N. D. Ill.).[23] In

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[21] The only remedy of the defendant is to sue his abductors for trespass and false imprisonment. *Ker* v. *Illinois, supra,* 119 U. S. at 444.

[22] Petitioner's attempts to distinguish the *Ker* case (Pet., No. 441, pp. 20–22) are competely lacking in substance. (1) While *Ker* involved a state prosecution, treaties govern state and federal courts equally and subsequent federal cases have refused to make any distinction between cases arising in state and federal courts. *E. g., United States* v. *Toombs,* 67 F. 2d 744 (C. A. 5); *United States* v. *Unverzagt,* 299 Fed. 1015 (W. D. Wash.), affirmed, 5 F. 2d 492 (C. A. 9), certiorari denied, 269 U. S. 566. (2) Whether or not the treaty between the United States and Peru was in fact in force, the Court throughout its opinion assumed that it was in force. (3) Not only is there no indication in the decision that the Court considered the case as if Ker had been expelled by the duly constituted governing authority, but the Court explicitly stated that "it was a clear case of kidnapping * * * without any pretence of authority under the treaty * * *" (119 U. S. at 443).

[23] Petitioner also tries to distinguish the lower court decisions here cited (Pet., No. 441, p. 24). But these attempted distinctions are likewise baseless since the courts expressly state that the defendant has no standing to challenge a violation of a treaty. Compare the rule that international immunities are for the benefit of the state, rather than the individual, and may be waived without the consent of the individual. See, Brief for the Petitioners, *Wilson, et al.* v. *Girard,* No. 1103, O. T., 1956, pp. 34–37 (authorities cited).

Frisbie v. *Collins*, 342 U. S. 519, 522, this Court reaffirmed the holding of *Ker*, which is dispositive of the merits of the present issue, in the most emphatic terms: "This Court has never departed from the rule announced in *Ker* v. *Illinois* * * * that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.' No persuasive reasons are now presented to justify overruling this line of cases."

Neither *United States* v. *Rauscher*, *supra*, nor *Cook* v. *United States*, *supra*, relied upon by petitioner (Pet., No. 441, pp. 10–14), in any way undermines the holding of *Ker* as approved in *Frisbie*. The *Cook* case was a civil suit involving the illegal seizure of a foreign vessel. In the present case, petitioner is an individual and a citizen of this country. The *Cook* case itself carefully distinguished prior cases involving seizures of vessels of American registration (288 U. S. at 122). In addition, the courts have consistently differentiated between civil and criminal cases in which jurisdiction of the defendant has been secured by illegal means. In *In re Johnson*, 167 U. S. 120, 126, this Court stated that "[t]he law will not permit a person to be kidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim, but in criminal cases the interests of the public override * * *." The *Rauscher* case, which held that a defendant extradited for one offense under an extradition treaty cannot be tried for a different offense, provides the one excep-

tion to the rule that the federal courts do not concern themselves with how the defendant comes before them. But *Ker*, which was decided on the same day as *Rauscher*, both the opinions being written by the same Justice (Miller), distinguishes *Rauscher* on the ground that (119 U. S. at 443) "it is quite a different case when the plaintiff in error comes to this country in the manner in which he was brought here, clothed with no rights which a proceeding under the treaty could have given him * * *."

In summary, apart from the fact that petitioner first waived the contentions which he now seeks to assert, and that they have been previously litigated, it is perfectly plain that the contentions are entirely lacking in merit.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
WILLIAM F. TOMPKINS,
Assistant Attorney General.
PHILIP R. MONAHAN,
CARL G. COBEN,
BRUCE J. TERRIS,
Attorneys.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 440-441

MORTON SOBELL, *Petitioner*,

vs.

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICI CURIAE*

DANIEL G. MARSHALL,
4041 Marlton Avenue,
Crenshaw Center,
Los Angeles, California,
Attorney for Amici Curiae.

Of Counsel:
FORMER JUDGE EDWARD P. TOTTEN,
712 E. Chapman,
Orange, California.

LAURENT B. FRANTZ,
3044 Wheeler Street,
Berkeley, California.

IN THE

Supreme Court of the United States

October Term, 1957

No. .....

MORTON SOBELL,

Petitioner,

vs.

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, as counsel for those hereafter named who have authorized the inclusion of their names in an *amicus curiae* brief, respectfully move this Honorable Court for permission to file the accompanying brief, as *amici curiae*. The attorneys for the petitioner have consented to the filing of this brief. Permission for leave to file has been requested from the Solicitor General and is under consideration by him.

WHEREFORE, it is respectfully requested that this Honorable Court grant this motion for leave to file the annexed brief as *amici curiae*.

IN THE

Supreme Court of the United States

October Term, 1957

No. ....

MORTON SOBELL,

Petitioner,

vs.

UNITED STATES OF AMERICA.

BRIEF AS FRIENDS OF THE COURT

It is with the deepest regard and affection, as citizens, for the integrity of our system of justice, our country's standing in the community of nations, and the fair administration of federal criminal law that the persons named below have authorized an *amicus curiae* brief to be filed in their behalf. The importance of these considerations is overriding. The propriety of their presentation rests in the tradition of this Court to dispense justice in the light of constitutional principle and paramount national interest.

In the present motion before the Court, the petitioner seeks a hearing, under 28 U. S. C. 2255, upon his claim that the prosecution knowingly used false evidence and perjured testimony to obtain his conviction. Throughout the proceedings in the lower courts the prosecution has failed to deny these charges. It is this failure to come forward and answer the charges and facts alleged in the petitioner's motion papers that is our primary concern. It is our belief that the refusal to deny or to admit the

petitioner's claims could do incalculable harm to our reputation as a nation believing in and exercising justice under law, to our position in the world community and to our administration of justice.

We deal here with a cause celebre. This is a case which has stirred the minds and hearts of men and women throughout the world. This case has provided and continues to provide an index of the American concept of justice and due process.

In this setting the prosecution's refusal to meet the petitioner's factual claims is most disturbing. We assume, without conceding, that there is no technical legal compulsion for the prosecution to answer if it believes the motion to be insufficient on its face. But by its silence the prosecution has cast a shadow of doubt upon its function of rendering justice. By failing to deny the charge and standing upon dry technicality, the prosecution undoubtedly hopes to avoid raising factual issues to be resolved by a hearing. But, in reality, it thereby draws a picture of a great nation, with its ubiquitous power, reluctant to meet the accusations of an incarcerated petitioner that his conviction was fraudulently obtained.

Such a picture can only be to the detriment of our nation. The prosecution's actions can only stir questions of doubt as to the character of our criminal justice at a time when the world-wide battle for the minds of men is at fever pitch. We have the utmost confidence that once the true facts, whatever they may be, are before the court, justice under the law and the constitution will result.

A strong and free nation need not fear the open and just hearing that would take place here. If the claim of fraudulently obtained conviction is without merit, let the nation and the world have such a resolution by our traditional judicial hearing. If the true state of the facts can be explained so as to be justified, let it be so determined

by hearing. If the contentions of the petitioner are unfortunately true, let the nation and the world know that we maintain not only justice, but also the ability to correct, by due process, those miscarriages of justice which were a product of untempered passion now since confined and repelled by the mandate of our constitutional system.

As a legal tactic the prosecution's actions do not measure up to the standard of criminal justice in which we pride ourselves. The government's attorney is not merely the prosecutor. As this Court pointed out in *Berger* v. *United States*, 295 U. S. at 88, he is the representative of the nation, "Whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution, is not that it shall win a case, but that justice shall be done * * *. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

It is our belief that the prosecution should answer the charges and proceed to a hearing on the facts. This is not a mere question of expediency of the moment. An issue of principle is raised going to the core of the fair administration of federal criminal justice. The seriousness of the charge of the prosecution's knowing use of false evidence and perjured testimony, developed with detail and specification, more than warrants a hearing on its merits. It compels a hearing. As Mr. Justice Frankfurter recently had occasion to say in *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. at 124:

> The untainted administration of justice is certainly one of the most cherished aspects of our institution. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain

that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.

Furthermore, the petitioner's moving papers touch on the delicate and important issue of our relations with other sovereign nations. The petitioner has alleged that he was abducted by agents of the prosecution from the territory of the United States of Mexico in violation of an outstanding treaty between our country and Mexico. Our country stands as the greatest nation in a world community of great and small countries. We are a leader of sovereign nations. By our actions we must set an unimpeachable example of respect for the sovereign integrity of our smaller neighbors. We can do no less without irrevocably offending others and degrading our democratic system.

By failing to respond to the petitioner's claims, the prosecution, in effect, has done a disservice to our role among the countries of the world. As long as the petitioner's claim remains unanswered the doubt remains that our country violated the national sovereignty of a friendly neighbor in disregard of an existing treaty.

Finally, we wish to indicate our concern with the historical legal context in which the refusal to answer the petitioner's charges, contained in his motion for a hearing, takes place. Petitioner seeks a hearing under Section 2255. Such a statutory hearing is in the nature of and affords the same rights as a habeas corpus proceeding. Thus, his motion has its source in "the most celebrated writ in the English law" (3 Blackstone's Commentaries 129). Undoubtedly, this is only proper. The Great Writ has historically been the protector of the liberty of the subject. Its role was forged in the struggle against the exercise of arbitrary power by the English Crown in the 16th and 17th centuries culminating in the Habeas Corpus Act of 1679, 31 Charles II, c. 2.

The prosecution's attempt to avoid the spirit and letter of this fundamental legal provision for hearing, we believe, is, itself, reproachable. If we, as Americans, are to continue to uphold the Great Writ of Habeas Corpus as a symbol of our democratic process it must maintain its vitality in situations such as the instant one. The Bill of Rights permits no digressions from its mandates. As this Court recently stated in *Reid* v. *Covert*, 354 U. S. at 39: "Slight encroachments create new boundaries from which legions of power can seek new territory to capture." A Section 2255 hearing, as Mr. Justice Harlan stated in *Chessman* v. *Teets*, 354 U. S. at 165, is available "no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be."

In the absence of an answer to the petitioner's charges by the prosecution, and without a hearing, fundamental questions of policy and justice will remain forever open. Without a hearing, not even history will be able to record whether our precious and inviolate rights were able to surmount and overcome the prejudices and biases of the moment. An order for a hearing can only be a victory for our democratic system of justice. To this end and with this concern we have submitted this *amici curiae* brief.

CONCLUSION

We urge this Court to grant certiorari to consider petitioner's claim to a hearing.

Respectfully submitted,

DANIEL G. MARSHALL,
Attorney for Amici Curiae.

Of Counsel:
FORMER JUDGE EDWARD P. TOTTEN,
LAURENT B. FRANTZ,

Amici Curiae: *

Dr. Harold C. Urey, Chicago, Ill.,
Professor Francis D. Wormuth, Salt Lake City, Utah,
Professor Malcolm P. Sharp, Chicago, Ill.,
Maxwell Geismar, Harrison, N. Y.,
Stephen S. Love, Chicago, Ill.,
Rabbi Samuel Horowitz, Billings, Mont.,
Rabbi Wolli Kaelter, Long Beach, Calif.,
Professor Emeritus J. M. Kuehne, Austin, Texas,
Dr. Leo Mayer, New York City, N. Y.,
Rev. Dryden L. Phelps, Berkeley, Calif.
Bishop Henry Cutter, San Francisco, Calif.
Margaret T. Simkin, Los Angeles, Calif.,
Dr. Ada M. Field, Guilford College, North Carolina,
Rev. Stephen H. Fritchman, Glendale, Calif.,
Judge Norval K. Harris, Sullivan, Ind.,
Professor Arthur K. Davis, Burlington, Vt.,
Rabbi Dr. J. Harold Sharpman, Los Angeles, Calif.,
Rev. Gross W. Alexander, Lucerne Valley, Calif.,
Rev. Paul E. Howard, Los Angeles, Calif.,
S. Miles Bouton, Sr., Jamestown, N. Y.,
Rev. Kelley Key, Los Angeles, Calif.,
Rabbi Samuel Rosinger, Beaumont, Texas,
Rabbi Samuel Bernstein, Bronx, N. Y.,
Rev. John E. Evans, Columbus, Ohio,
Rev. Harlan R. Waite, Los Angeles, Calif.,
Rev. Ernest D. Pipes, Jr., Santa Monica, Calif.,
Rabbi Avery J. Grossfield, Florence, South Carolina,
Helen Marsten Beardsley, Los Angeles, Calif.,
Rev. Alan A. Hunter, Los Angeles, Calif.,
Clara M. Vincent, Livonia, Michigan,
Rev. Donald K. Blackie, Los Angeles, Calif.,
et al.

* The full list of persons who have authorized the inclusion of their names as *amici curiae* has been filed with the clerk of the Court.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 441

MORTON SOBELL,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APEALS FOR THE SECOND CIRCUIT

FRANK J. DONNER,
ARTHUR KINOY,
MARSHALL PERLIN;
342 Madison Avenue,
New York, New York,

BENJAMIN DREYFUS,
703 Market Street,
San Francisco, California,

Attorneys for Petitioner.

Of Counsel:
FRANK J. DONNER,
ARTHUR KINOY,
MARSHALL PERLIN,
BENJAMIN DREYFUS,
LUIS SANCHEZ PONTON,
University of Mexico,
Mexico City, Mexico.

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IN THE

Supreme Court of the United States

October Term, 1957

No.

MORTON SOBELL,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit which affirmed an order of the United States District Court for the Southern District of New York, denying a motion for a hearing pursuant to Title 28, U. S. C., Section 2255.

Opinions Below

The opinion of the district court denying petitioner's motions for hearings * pursuant to Title 28, U. S. C., Section 2255 is reported at 142 F. Supp. 515 and appears in

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* Petitioner instituted two proceedings for hearings pursuant to Title 28, U. S. C., Section 2255. The first motion, filed on May 8, 1956, is the subject of the petition for writ of certiorari filed herewith. This petition relates to the second motion for a hearing made on May 25, 1956.

the record at A. 197.* The opinion of the court below is reported at 244 F. 2d 520, and is attached to the companion petition as Appendix II.

Jurisdiction

The judgment of the Court of Appeals was entered on May 14, 1957 (Appendix I to companion petition). A petition for rehearing was denied on June 3, 1957. On August 28, 1957, the time for filing petitions for writ of certiorari herein was extended to and including September 10, 1957, by order of Mr. Justice Harlan. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U. S. C., Section 1254(1).

Questions Presented

1. Whether the seizure of petitioner in the territory of the Republic of Mexico by agents of the United States Government without the consent of the Government of Mexico and the subsequent trial of petitioner in disregard of the provisions of the existing Treaty of Extradition, constitute a violation of the treaty.

2. Whether such conduct in disregard of the Treaty of Extradition by the United States deprived the United States Government and consequently its courts of any power to try petitioner and to impose sentence.

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* We designate with the letter "A" references to the current record on appeal. The printed record of the original trial is referred to as "R". We shall refer also to certain appendices designated by Roman numerals attached to the companion petition for writ of certiorari filed simultaneously with this petition. In addition, photostatic copies of the exhibits and Appendices A to D attached to the motion of May 8, 1956 have been filed with the Court.

3. Whether the fundamental lack of jurisdiction in the United States to proceed in the face of a violation of a binding Treaty of Extradition renders a sentence subject to attack under Title 28, U. S. C., Section 2255.

4. Whether it was error for the district court to deny petitioner a hearing on this motion pursuant to Title 28, U. S. C., Section 2255, seeking to vacate the judgment of conviction in that the trial court lacked total jurisdiction to proceed as a result of the violation by the United States of the binding Treaty of Extradition with the Republic of Mexico.

Treaties and Laws Involved

a. Statute Involved

Title 28, U. S. C., Section 2255 is reprinted in the companion petition at p. 4.

b. Treaty Involved

The treaty of extradition between the United States and Mexico presently in force was concluded in 1899 and supplemented in 1902, 1925 and 1939. 31 Stat. 1818.

Article II of the treaty limits the criminal jurisdiction of the contracting parties, in the case of alleged fugitives found in each other's territory, to certain enumerated offenses. These do not include the crime with which petitioner was charged. Article III bars proceedings for offenses of a political character. Article VIII sets forth the steps to be followed in requesting the surrender of fugitives and the documents that are to accompany each request. The article further provides that upon fulfillment of these requirements, the fugitive be brought before the proper

judicial authority for a decision as to the propriety of the extradition in accordance with the law and the evidence.*

c. The Applicable Laws of Mexico

The Mexican laws relevant to the surrender of persons charged with the commission of crime in the United States are the Constitution of the United States of Mexico and the Law on Extradition of Mexico.**

Statement of the Case

The history of the prior and present proceedings in this case is set forth in the companion petition for writ of certiorari at pages 5-7. The facts upon which the present petition rests are essentially those in the motion of May 8, 1956 (A. 7 *et seq.*), which are discussed in the companion petition for writ of certiorari.

In the record brought up by this petition there is no denial of any of petitioner's factual allegations. Accordingly, for the purpose of determining whether a hearing should have been granted, the facts alleged in the motion will be deemed to be true. *Chessman* v. *Teets*, 350 U. S. 3, 4.

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* The full texts of Articles II, VIII and XII, and the relevant portions of Articles III and VII are printed in the appendix to this petition. See also, Convention between the United States of America and other American Republics, signed at Montevideo, December 26, 1933. U. S. Treaty Series No. 882.

** The relevant portions of the Constitution of Mexico and the Law on Extradition are set forth in Appendices A and C attached to the motion of May 8, 1956. A summary of these provisions is printed in the appendix to this petition.

We summarize here the basic allegations supporting the present motion for a hearing (A. 78 *et seq.*).

The unlawful abduction of petitioner from the sovereign territory of Mexico by agents and representatives of the United States Government and his subsequent prosecution in the United States were in total violation of the provisions of the treaty of extradition of 1899 between the United States of America and Mexico (31 Stat. 1818). The United States did not follow any of the requirements of the treaty to seek petitioner's extradition by the Government of Mexico. Consequently, petitioner was deprived of a hearing on probable guilt and judicial and executive review in Mexico, as prescribed by the treaty and the Mexican law on extradition. Finally, the United States proceeded against petitioner in a domestic court upon a crime for which the treaty precludes removal and prosecution.

The Government of Mexico in no way consented to this violation of its sovereignty and of the binding treaty of extradition. It in no way participated in petitioner's seizure. It neither deported nor expelled petitioner. And directly upon hearing of the abduction, it protested the transgression against the treaty and Mexican sovereignty to agents of the United States and of the prosecution.

Reasons for Granting the Writ

I. The failure to grant petitioner a hearing on his allegations that the trial court was without jurisdiction violates due process of law.

Petitioner's right to the relief sought in his supplemental motion filed pursuant to Title 28, U. S. C., Section 2255 rests upon two contentions. The first is that the treaty of extradition between the United States and Mexico

constitutes an exclusive procedure for the rendition by Mexico of fugitives from the criminal process of the United States. The treaty commits both governments to resort only to its provisions. The second is that the seizure of petitioner by agents of the United States violates the treaty and for that reason deprived the United States of national and consequently judicial power to try petitioner or to impose sentence.

These two contentions are juridically linked by the fact that the treaty—like all treaties of this sort—safeguards the principles of territorial limitations upon the sovereign power of the demanding state and of the territorial inviolability of the sovereignty of the asylum state. The treaty creates a means of expanding the former without infringing upon the latter, through assent and collaboration in a specific manner and class of cases. The basis for the assent and collaboration and its juridical precondition is thus not only the plenary sovereign power of the asylum state but the lack of national power of the demanding state to function extraterritorially.

The extradition treaty is an exclusive means of dealing with the problem which it covers for the simple reason that there is an absence of power to proceed without it. A resort to self-help is not only a violation of the treaty in a particular instance, but a repudiation of the basic concept of national sovereignty which the treaty is designed to protect and fortify. The denial by the lower courts of petitioner's motion flows from a serious misconception of the scope and nature of the treaty involved here.

A. The violation of the treaty of extradition by agents of the United States deprived the trial court of jurisdiction to proceed against petitioner.

The allegations of petitioner's motion for a hearing make it quite clear that petitioner's seizure and abduction from Mexican soil was the result of a plan initiated, organized and supervised by agents of the United States. Thus, on the day of the kidnapping, a United States agent sought to establish the location of the apartment in which petitioner resided, on the pretext that he was sought by the United States for kidnapping a child (A. 28-29). Individuals who identified themselves as United States agents searched the premises where petitioner resided (A. 29). They admitted that they were the same persons who had forcibly seized petitioner and his family (A. 29). Personal effects found in petitioner's apartment were lodged with the United States Embassy in Mexico City (A. 30). Mexican nationals who knew petitioner were interrogated by FBI agents and one of them, on at least one occasion, was questioned at the United States Embassy itself (A. 30). Further dispelling the notion that the affair was a bit of spontaneous derring-do by Mexican police officers is the fact that petitioner's abductors were met on the Mexican side of the border by an FBI agent who stated that he had been waiting for the kidnapping party for several hours (A. 32).

The activities of agents of the FBI on Mexican soil and the role of the United States Embassy put beyond question the fact that we are dealing with an action of the United States. Nor is official responsibility diminished by the fact that some of the individuals participating in what was essentially one continuous act were not themselves FBI agents. The Government is bound by the conduct of those acting on behalf of the FBI. *Byars* v. *United States*, 273 U. S. 28.

The actions of the agents of the United States obviously did not conform to the procedural requirements set forth in Article VIII of the treaty (Appendix I, p. 4a, *infra*). The treaty further provides in Article VIII that Mexican law shall govern the procedures testing the legality of the extradition demand. The Mexican legal processes embraced by the treaty were ignored as well. Nor is it difficult to conceive why self-help was substituted for the treaty. The offense for which petitioner was tried is excluded from the list of offenses in Article II for which extradition is available. And added to this is the bar imposed by Articles III and VII of the treaty affirmatively denying extradition for any "political crime or offense" or "on account of any act connected with such a political crime or offense."*

Under these circumstances, the only alternative available to our Government was to seek the consent of the Mexican Government to a procedure for obtaining custody of petitioner. But that was not done here, although it

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*The trial court admitted evidence as to alleged membership in the Communist Party as proof of motivation (e.g., R. 964-1024, 1558, 1601-1603, 1612-1615). It is not without irony that the United States Government has always insisted upon the exemption of political offenses in extradition treaties. See *Factor* v. *Laubenheimer*, 290 U. S. 276, 299:

> "President Tyler, in his message transmitting the Treaty of 1842 to the Senate for consideration, referred to article 10 as 'carefully confined to such offenses as all mankind agreed to regard as heinous and as destructive to the security of life and property. In this careful and specific enumeration of crimes, the object has been to exclude all political offenses, or criminal charges, arising from wars or intestine commotions.' Executive Documents, vol. 1, 1842-43, Doc. No. 2, p. 22."

is historically and currently * the accepted (and only) way to proceed in the case of a non-extraditable offense.**

By entering into a treaty of extradition with Mexico, the United States circumscribed its national power to proceed judicially against persons accused of crime in this country who are found on Mexical soil. Consequently, when agents of the United States violated the provisions of the treaty, the domestic courts of the United States lost judicial power to proceed. This absence of judicial power does not rest upon the illegal kidnapping of petitioner as such, but rather upon the violation of the treaty which limits the power of the United States to proceed against alleged fugitives found in Mexican territory.

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* Only recently our Government has recognized in the cases of two American nationals indicted for espionage and resident in France that the extradition treaty with that country bars extradition. Consequently, consent to their return is being sought from France. See *New York Times*, July 9, 10 and 11, 1957.

** The legal obligation to seek consent rather than to employ self-help in a *sine qua non* of our diplomacy. As a Secretary of State once wrote:

> "* * * to interpret an extradition treaty, which under our Constitution is a supreme law of the land, in a way that does violence to its obvious meaning and our consistent contention as to its meaning, so as to produce the precise situation which the treaty was designed to meet and correct, can not be justified."
>
> Secretary of State Knox, December 9, 1910, *Papers relating to the Foreign Relations of the United States*, 1910, p. 657.

And, where, as here, the treaty parties share a common border, a meticulous regard for the claims of sovereignty becomes a touchstone of good faith with respect to all dealings between the two countries.

Since the power of the sovereign essentially is territorial,* attempts to exercise that power extraterritorially, in violation of treaty obligations, are void *ab initio*.

This principle was enunciated by the Court in *Cook* v. *United States*, 288 U. S. 102, which involved the seizure by United States agents of a ship of British registry, the *Mazel Tov*, while it was cruising some eleven and a half miles off our coast with a cargo of unmanifested liquor. A penalty was assessed against the master, and ship and cargo libelled, upon the charge of hovering for smuggling purposes in violation of the Custom Law (Section 581 of the Tariff Act of 1930). This was a federal offense admittedly cognizable by the district court, and the cargo, the vessel and its master were actually brought within reach of that court's process.

After answering to the merits, the respondent objected that the seizure which initiated the proceedings was not in conformity with the treaty of 1924 between the United States and Great Britain (43 Stat. 1761). That treaty granted to the United States authority to board and search ships of British registry beyond the territorial waters of the United States, but not at a greater distance from the United States coast than they could travel in one hour. The maximum speed of the vessel in the *Cook* case was ten miles per hour. However, it was seized eleven and a half miles off the coast. Accordingly, the respondent argued that the court lacked national jurisdiction as a result of the extraterritorial action in violation of the binding treaty.

In response to this contention, the Government urged that (1) the illegal seizure was immaterial since the court

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*See *Rose* v. *Himely*, 4 Cranch. 241, 279; *Reid* v. *Covert*, — U. S. —, 77 S. Ct. 1222; 1 Beale, *Treatise on the Conflict of Laws*, Section 56.1, p. 306; Rafuse, *The Extradition of Nationals* (1939), p. 142; Hawley, *The Law and Practice of International Extradition* (1893), p. 1; 1 Moore, *Extradition*, Section 158, p. 281.

had both "subject-matter" and "personal" jurisdiction over the master, ship and cargo, (2) the judicial proceedings initiated by the United States served to validate and ratify the prior acts of its agents, if wrongful, and (3) in any event, the answer to the merits waived any objections to jurisdiction. Mr. Justice Brandeis characterized these arguments as "misconceptions."

In an analysis which applies directly to the treaty violation here, Mr. Justice Brandeis wrote for the Court, 288 U. S. at 120-122:

> "As the *Mazel Tov* was seized without warrant of law, the libels were properly dismissed. The government contends that the alleged illegality of the seizure is immaterial. It argues that the facts proved show a violation of our law for which the penalty of forfeiture is prescribed; that the United States may, by filing a libel for forfeiture, ratify what otherwise would have been an illegal seizure; that the seized vessel having been brought into the port of Providence, the federal court * * * acquired jurisdiction; and that, moreover, the claimant by answering to the merits waived any right to object to enforcement of the penalties. The argument rests upon misconceptions.
>
> "It is true that where the United States, having possession of property, files a libel to enforce a forfeiture resulting from a violation of its laws, the fact that the possession was acquired by a wrongful act is immaterial. Dodge v. United States, 272 U. S. 530, 532 * * *. Compare Ker v. Illinois, 119 U. S. 436. * * * The doctrine is not applicable here. The objection to the seizure is not that it was wrongful merely because made by one upon whom the government had not conferred authority to seize at the place where the seizure was made. The objection is that the government itself lacked power to seize, since by the treaty it had imposed a territorial limitation upon its own authority. * * * Our government, lacking power to seize, lacked power, because of the treaty, to subject the vessel to our

> laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the treaty. Compare United States v. Rauscher, 119 U. S. 407 • • • ."

This case is wholly governed by *Cook*. In *Cook*, the treaty with Great Britain limited the jurisdiction of the United States to search and seize vessels of British registry to specified distances and particular purposes. Here, the treaty of extradition with Mexico limits the jurisdiction of the United States to recover and proceed against alleged fugitives to enumerated crimes and specific procedures. In *Cook*, United States agents seized the master, vessel and cargo beyond the limits permitted by treaty. Here, United States agents, disregarding the treaty, arranged and participated in the extraterritorial seizure and removal of petitioner for an alleged crime excluded by treaty. In *Cook*, the British Government did not consent to the treaty violation. Here, there was no consent by the Government of Mexico.

The Court's decision in *Cook* relies heavily on *United States* v. *Rauscher*, 119 U. S. 407, which similarly held that no valid adjudication may rest upon an assertion of national power in violation of applicable treaty provisions. The treaty in *Rauscher* was an extradition compact with Great Britain. Like the treaty here, it limited proceedings against alleged fugitives to specifically enumerated crimes and required adherence to particular procedures. While complying with the treaty requirements in obtaining Rauscher's removal to face a murder charge, the United States proceeded to prosecute him for the crime of inflicting cruel and unusual punishment, an offense not specified in the treaty.

Rauscher complained that this departure from the treaty nullified the proceedings. The Government insisted that Rauscher's presence before the trial court upon an

offense substantively cognizable by the court was sufficient to establish both personal and subject-matter jurisdiction, even if there had been some technical treaty violation. Accordingly, this Court faced the issue whether disregard of a treaty prerequisite affected the fundamental power to proceed, or whether it was merely an impropriety in apprehending the defendant, waived when the court had personal and subject-matter jurisdiction.

The Court held that it was a question of fundamental power. For, absent the treaty (or equivalent mutual agreement between the two nations), the United States possessed no power to remove and proceed criminally against alleged fugitives located in another land.

Since the fundamental power to obtain possession of fugitives originates in the treaty, the Court explained, national power to proceed depended upon full treaty compliance. This, the Court pointed out, is "not only apparent from the general principle that the specific enumeration of certain matters and things implies the exclusion of all others, but the entire face of the treaty, including the processes by which it is to be carried into effect, confirms this view of the subject." 119 U. S. at 421.*

If in *Rauscher* it was "impossible to conceive" (at 422) of the exercise of criminal jurisdiction by the United States against the defendant because of the violation of the treaty of extradition with Great Britain, then it is equally "impossible to conceive" of the exercise of jurisdiction by the United States against petitioner as a result of its total breach of the treaty of extradition with Mexico.

The district court sought to minimize the applicability of *Rauscher* by characterizing the decision of the Court as

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* See also, the cases and authorities discussed in *United States* v. *Mulligan*, 74 F. 2d 220, 221 (C. A. 2), 4 Hackworth, *Digest of International Law*, Section 306, pp. 11-12, 1 Moore, *Extradition*, Section 16, p. 21, and Fenwick, *International Law* (1934), p. 237.

merely an exception to the general rule relating to prior wrongful seizure in a criminal case. But this characterization misstates *Rauscher*. There was no wrongful seizure as such in *Rauscher*; the defendant there was removed from England by proper process. Nor can the case be confined to a situation in which an individual is tried for an offense other than that for which he was extradited. On the contrary, the Court in *Rauscher* speaks of the force of all treaty provisions. It holds that the "provisions are obligatory" and that a fugitive "can only be taken under a very limited form of procedure."

B. The treaty creates an exclusive means of obtaining custody over fugitives on Mexican soil.

1. THE TREATY OF EXTRADITION DOES NOT SANCTION OR AUTHORIZE THE KIDNAPPING OF AN INDIVIDUAL BY AGENTS OF ONE PARTY FROM THE TERRITORY OF ANOTHER.

As we have already suggested, the same considerations which deprived the court of jurisdiction to try and sentence petitioner, likewise establish that the treaty provisions cannot be by-passed by resort to self-help.

The court below apparently accepted the view that a violation of the treaty would have deprived the United States of jurisdiction to proceed against petitioner, conceding that it "must inquire, therefore, whether there has been a violation of the treaty with Mexico" (Appendix II to companion petition, p. 10a). The court, nevertheless, ruled that petitioner's allegations do not show a violation of the governing treaty on the ground that no extradition treaty, including the treaty with Mexico, "in terms prohibits abduction by one party of criminals found in the territory of the other." (Appendix II to companion petition, p. 11a.)

If the Mexican Government secretly arranged to have a Mexican national, residing in the United States, kidnapped

and spirited across the border, without the knowledge and approval of the United States Government, would anyone seriously contend that this abduction from the territory of the United States was an act within the terms of the extradition treaty? The answer is found, if one must search at all, in our own diplomatic history. Our Government has unequivocally taken the position that the treaty of extradition with Mexico prohibits the forcible abduction by one party of criminals found in the territory of the other.

Thus, Secretary of State Blaine declared:

> "The treaty of extradition between the United States and Mexico prescribes the forms for carrying it into effect, and does not authorize either party, for any cause, to deviate from those forms, or arbitrarily abduct from the territory of one party a person charged with crime for trial within the jurisdition of the other." *

Secretary of State Frelinghuysen reiterated this position on behalf of the United States:

> "The treaty between the United States and Mexico creates an obligation on the part of the respective governments * * * and where the obligation ceases the power falls. * * * It would be a great evil that those guilty of high crime, whether American citizens or not, should go unpunished; but even that result could not justify an usurpation of power." **.

These statements reflect the consistent interpretation by the United States Government of the obligations assumed under extradition treaties. Our Government has always adhered to the position that the recovery of alleged fugitives by one treaty nation from another may be accom-

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* 4 Moore, *Digest of International Law*, Section 603, p. 330.

** 1 Moore, *Extradition*, Section 135, pp. 166-168. See also 4 Hackworth, *Digest of International Law*, Section 306, pp. 11-12; Section 307, p. 15, and Section 345, p. 224, pointing out that this policy has been uniformly followed.

plished only pursuant to treaty or the consent of the other sovereign. 1 Moore, *Extradition*, Section 135, p. 167. This has been our policy from the earliest days of our diplomatic relations with other states.*

Thus the diplomatic history of the United States refutes the interpretation of the lower court. For example, on March 14, 1911, the State Department addressed a note to the Mexican Ambassador relating that two young American citizens, Lawrence F. Converse and Edward M. Blatt, had been kidnapped on American territory and conveyed across the Rio Grande to Mexican territory. On the other side of the border were Mexican soldiers, whose commanding officer appeared to be directing the kidnappers' work. The note stated that the Americans had been placed in jail at Ciudad Juarez and were being held on the charge of sedition, awaiting trial in a Mexican federal court. The matter was being further investigated, the note continued, since the kidnapping of American citizens from American territory constituted "a grave violation of the sovereignty of the United States by officials of the Mexican Government." The note concluded:

> "Should such an investigation result in clearly establishing that these two boys were actually kidnapped upon American territory and taken into Mexican territory, the Government of the United States will, as your excellency must perceive, find itself under the necessity of requesting that they be immediately returned, with appropriate explanations, to the American territory from which they were taken.

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* Thus, James Monroe, as Secretary of State, instructed our ministers to the following effect:

> "Offenders, even conspirators, cannot be pursued by one power into the territory of the other, nor are they to be delivered up by the latter, except in the compliance with treaties, or by favor." Quoted in Grooms, *International Extradition*, 15 Kentucky L. J. 30, 33-34 (1926).

> "Should it transpire in the course of the investigation that they have committed any offense which is properly extraditable under the existing treaty of extradition between the United States and Mexico, I need not assure your excellency that your Government will naturally possess the right to institute, in accordance with the treaty, regular proceedings looking to the return of these boys to Mexico for trial and punishment for the extraditable crime with which they may be charged." *

If the forcible kidnapping of an individual from the territory of the United States by agents of the Mexican Government was a violation of the treaty of extradition, then the abduction of petitioner from the territory of Mexico by agents of the United States is likewise a violation of the treaty of extradition. Any other interpretation of the treaty would destroy international obligations. From *Rauscher* to *Cook* and from *Cook* to *Girard*,** the decisions of this Court and the inferior federal courts recognize the exclusive nature of a treaty obligation. The treaty alone creates national power to maintain proceedings based upon extraterritorial action, absent the consent of the asylum sovereign.

Thus, Chief Justice Hughes commented in *Valentine v. United States ex rel. Neidecker*, 299 U. S. 5, 7, 9:

> "The question is not one of policy, but of legal authority. * * * Proceedings * * * must be authorized by law. There is no * * * discretion * * * unless that discretion is granted by law. * * *
>
> "Whatever may be the power of the Congress to provide for extradition independent of treaty, that power has not been exercised save in our relation to a foreign country or territory 'occupied by or under the control of the United States'."

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* Acting Secretary of State Wilson to the Mexican Ambassador de la Barra. *Papers relating to the Foreign Relations of the United States*, 1911, pp. 606-607. See also Appendix III, *infra*, for a collection of other episodes from our diplomatic history.

** — U. S. —, 77 S. Ct. 1409.

And in *Factor* v. *Laubenheimer*, 290 U. S. 276, this Court held (at 287):

> "* * * the principles of international law recognize no right to extradition apart from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled * * * the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty.
> "* * * To determine the nature and extent of the right we must look to the treaty which created it." *

The proposition advanced by the lower court that the treaty of extradition does not prohibit abductions by agents of one contracting party from the territory of the other is in direct conflict with the decisions of other courts of appeal and inferior federal courts.

In *Collier* v. *Vaccaro*, 51 F. 2d 17 (C. A. 4), an alleged narcotics dealer was arrested and forcibly taken from Canada to the United States through the activities of an informer working with United States narcotics agents, without resort to the extradition treaty with Canada. Judge Parker held that there was no authority for such proceedings apart from the existing treaty (at 19):

> "A person may be carried out of the country to answer for crime * * * only by the authority of the highest executive officials and in accordance with treaty provisions governing extradition."

See also *Villareal* v. *Hammond*, 74 F. 2d 503, 505 (C. A. 5).

One of the most vivid expressions of this principle is found in *Ex Parte Coy*, 32 Fed. 911 (D. C. Tex.). Dealing with a claim of impropriety in a removal from Mexico to the United States, the court explained (at 917):

> "This government has entered into solemn treaty stipulations with Mexico with reference to refugees

* See also *Johnson* v. *Browne*, 205 U. S. 309.

> from justice. These stipulations are, by a declaration of the Constitution of the United States, the supreme law of the land, state constitutions and laws to the contrary notwithstanding. These stipulations this government cannot forget, nor can it justify their violation, without justly incurring the contempt of the civilized world; and yet we are seriously told that Mr. Coy has waived this binding obligation on the part of the United States, and has conceded the right of Mexico to expect the government of the United States to keep its plighted faith * * *."*

In essence the rationale of the lower court rests upon a fallacious concept of the law of nations. An extradition treaty may not be ignored at will by a signatory party. It is a compact between civilized nations which limits their sovereignty. It is exclusive in its terms and premises. As one leading authority in this field has put it:

> "* * * where a treaty has been made, giving the right and creating the obligation, it is to be assumed that the treaty was intended to cover all the cases in which, and to embrace all the conditions and terms upon which, the respective parties will either make a demand or grant a surrender. They enter into the compact for this purpose, and exhaust the purpose in the compact. The compact is the whole law for their government on the subject. * * * The treaties and laws furnish the basis of the proceedings, and are hence the test of their validity and regularity." Spear, *The Law of Extradition* (2d ed., 1884), p. 221.**

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* Criminal proceedings by the United States against alleged fugitives located in Mexico have frequently come before the state courts of Texas, which have reflected a singular sensitivity to the jurisdictional limitations imposed on the United States and Mexico by the treaty of extradition. See *Dominguez* v. *State*, 234 S. W. 79 (Ct. of Crim. Appeals of Texas); *Blandford* v. *State*, 10 Tex. App. 627 (Ct. of Appeals of Texas). See, also, *Benavidez* v. *State*, 154 S. W. 2d 260 (Ct. of Crim. Appeals of Texas), cert. den. 315 U. S. 811.

** See, also, Garcia-Mora, *International Law and Asylum as a Human Right* (1956), p. 138.

2. KER V. ILLINOIS DOES NOT JUSTIFY THE DENIAL OF RELIEF HERE.

The lower courts seek to derive support from *Ker* v. *Illinois*, 119 U. S. 436. They would read *Ker* as holding that total disregard of an existing extradition treaty by the United States is not a violation of that treaty. The Court of Appeals concluded that "the question presented is indistinguishable from that before the Supreme Court in *Ker* and * * * our decision here is controlled by that case" (Appendix II to companion petition, p. 12a).

No such broad claims can be made for this case. *Ker* cannot be extended beyond its facts so as to govern a contemporary problem of international rendition. As a study of the record will show,* in consequence of the confusion and imprecision of the legal rationales upon which the petitioner there sought relief and the respondent resisted it, neither of the parties developed the facts, in themselves highly obscure and confused, in support of legal arguments which would be relevant in a determination of the issue today. Thus, the lower court's conclusion that this case is "indistinguishable" from *Ker* is meaningless. The *Ker* case, as this Court recently said of *In re Ross*, "is one of those cases that cannot be understood except in its peculiar setting." *Reid* v. *Covert*, *supra*.

The defendant in *Ker* complained only because his abduction from Peru and subsequent trial in the state courts of Illinois for an offense under state law violated his right to due process of law, in that it interfered with a personal right to asylum in Peru. This Court held that Ker had no absolute right to asylum in Peru since personal asylum yields to governmental power in three ways: (1) expulsion by the asylum state; (2) assent by the asylum state to the surrender of the fugitive; or (3) action in conformity with a treaty of extradition. The mere kidnapping itself did not result, so the Court reasoned,

* And see the state court opinion, *Ker* v. *People*, 110 Ill. 627.

in a violation of Ker's right to due process of law. This is the crux of *Ker*. It involved solely an issue of due process in a state case against a background of an extraterritorial kidnapping from a country which had only *de jure* existence and whose *de facto* authorities had assented to and collaborated in the removal.

The kidnapping of Ker did not result in a violation of the treaty of extradition because no treaty was then in force. At the time of the kidnapping, Peru was under military occupation by Chile and, as the Attorney General of the State of Illinois took pains to point out to this Court:

> "At this time, a state of things existed in Peru which rendered the treaty between the United States and that government inoperative. There was no Peru."*

But more than this, the duly constituted governing authority, the Chilean military occupation force, cooperated fully in the seizure of Ker and in effect expelled him from its territory. This the Attorney General of Illinois also emphasized to the Court, pointing out that the military governor, General Lynch, dispatched an officer to assist in the expulsion of Ker. See Appendix II, *infra*. It is of course elementary that a sovereign state or its duly constituted authority has the plenary power to expel an individual from its borders. Such an expulsion naturally would not have violated an extradition treaty even if it had been in effect.

The only issue left for the Court, then, was whether the kidnapping of Ker, absent a violation of the treaty of extradition, was in itself a deprivation of due process of law. And it was in response to this contention that the Court held that in reviewing state criminal proceed-

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* We attach as Appendix II to this petition excerpts from the Brief for the Defendant in Error in *Ker* v. *Illinois*.

ings the due process clause of the Fourteenth Amendment could not be construed to protect a defendant from prior wrongful seizure as such.

In respect to this conclusion *Ker* has no applicability here. The present case does not involve review of a state criminal proceeding. The petitioner here does not raise the issue that his abduction *per se* is sufficient to void his conviction. The present case involves a violation of an extradition treaty. The treaty with Mexico was in full force and effect at the time of petitioner's kidnapping. The Government of Mexico in no way participated in or consented to his seizure. He was not expelled or deported from its territory. And he was kidnapped under the direction and at the instigation of agents and officers of the United States itself. Hence *Cook* and *Rauscher* govern this case.

We do not quarrel with the holding of the Court in *Ker* that an asylum country may expel, assent to removal or proceed under the treaty to surrender a fugitive on demand. Of course, Mexico could have expelled petitioner or consented to his removal. Such action would not have been in violation of treaty. But Mexico did not expel petitioner or consent to his removal. The United States, without regard for the requirements of the treaty or the sovereignty of Mexico, seized petitioner on Mexican territory.

We do not believe that this Court will read *Ker* to sanction disregard by representatives of this country for the sovereignty of a sister nation. But, if this is the meaning of *Ker*, then we are confident that the Court, conscious of its obligation to preserve our good name in the community of nations, will not hesitate to review and, if necessary, repudiate an outmoded holding. See Fairman, *Ker v.*

Illinois Revisited, 47 Am. J. Int. Law 678 (1953).* In any event, as the Court recently said concerning the *Ross* case, "at best [it] should be left as a relic from a different era." *Reid* v. *Covert*, *supra*.**

3. THE RELIANCE OF THE DISTRICT COURT ON CASES INVOLVING INTERNATIONAL REMOVAL ABSENT TREATIES OF EXTRADITION OR PURSUANT TO AD HOC AGREEMENT IS UNBOUND.

The district court relies on a series of cases which are wholly inapposite, including *United States* v. *Dickson*, 73 F. Supp. 683 (D. C. N. Y.); *United States* v. *Insull*, 8 F. Supp. 310 (D. C. Ill.); *Ex parte Lopez*, 6 F. Supp. 342 (D. C. Tex.); and *United States* v. *Unverzagt*, 299 Fed. 1015 (D. C. Wash.), aff'd 5 F. 2d 492 (C. A. 9), cert. den. 269 U. S. 568.

None of these cases is applicable here. Were these decisions in conflict with *Cook* v. *United States*, *supra*, they would of course yield to the ruling of this Court. But they are not. In these cases the United States had jurisdiction to proceed consistent with the *Cook*

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* We find it difficult to believe that the Court's reference to *Ker* in *Frisbie* v. *Collins*, 342 U. S. 519, meant to save a principle of law which would sanction the unilateral violation of an extradition treaty by agents of the United States. When Mr. Justice Black restated the rule of *Ker* in *Frisbie* he confined himself to the proposition that a forcible abduction *per se* does not impair the power of a court to try a person for crime. He did not write that *Ker* stands for the proposition that the United States may unilaterally violate an extradition treaty and arrange the kidnapping of an individual from the territory of another sovereign.

** Only recently the Government had the occasion to comment in this Court that certain legal theories advanced in this country in the past "smacked of colonialism and an effort to revive the extraterritoriality of another century." Brief for petitioners in *Wilson* v. *Girard*, *supra*, p. 32.

holding because there were no treaties;* special lawful authority existed; the specific agreement or consent of the duly constituted foreign government was obtained;** or the United States had not participated in the unlawful extra-territorial action.†

4. THE RELIANCE OF THE DISTRICT COURT ON CASES INVOLVING INTERSTATE ABDUCTION AND RENDITION IS UNFOUND.

The district court relied heavily on decisions of this Court in cases involving interstate abduction and rendition.‡ But it ignored the warning of this Court in *Lascelles* v. *Georgia*, 148 U. S. 537 at 546:

> "To apply the rule of international or foreign extradition, as announced in United States v. Rauscher * * * to interstate rendition, involves the confusion of two essentially different things which rest upon entirely different principles. In the former, the extradition depends upon treaty contract or stipulation * * *. In the matter of interstate rendition,

* Thus, the *Diron* case involved a prosecution for manslaughter and assault allegedly committed by a crew member on board a United States merchant vessel on the high seas. Neither a treaty nor the principle of territorial limits on national jurisdiction applied. Cf. *Gillars* v. *United States*, 182 F. 2d 962 (App. D. C.), and *Chandler* v. *United States*, 171 F. 2d 921 (C. A. 1), cert. den. 336 U. S. 918, which likewise do not involve treaty violations. The *Unzeuge* case involved only a removal proceeding from one Federal district to another.

** In *Jurnll*, the defendant was removed by duly constituted Turkish authorities without participation by agents of the United States. Moreover, there was no applicable treaty then in force. 8 F. Supp. at 311.

† In *Lopez*, the district court stressed the fact that there was no participation by agents of the United States in the extraterritorial action.

‡ See, for example, the reliance upon *In re Johnson*, 167 U. S. 120; *Pettibone* v. *Nichols*, 203 U. S. 192; *Mahon* v. *Justice*, 127 U. S. 700, and *Frisbie* v. *Collins*, 342 U. S. 519.

> however, there is the binding force and obligation, not of contract, but of the supreme law of the land, which imposes no conditions or limitations upon the jurisdiction and authority of the state to which the the fugitive is returned."

The considerations which require the enforcement of international extradition treaties are not present in the relationship between states of the Union. In the treaty cases, this Court has pointed out that what is involved are the rights and duties of sovereigns. These factors have no play in the relations between states of the Union. In cases dealing with interstate rendition, the central consideration is the overriding power of the supreme law of the land, which, as this Court has put it, "imposes no conditions or limitations upon the jurisdiction and authority of the state to which the fugitive is returned."

For, as this Court pointed out in *Lascelles*, at 542 and 545-546:

> "* * * the fallacy of the argument lies in the assumption that the states of the Union occupy towards each other, in respect to fugitives from justice, the relation of foreign nations, in the same sense in which the general government stands towards independent sovereignties on that subject. * * * The case of United States v. Rauscher * * * has no application * * * because it proceeded upon a * * * treaty between the United States and Great Britain * * *."

It is for this reason that the emphasis placed by the courts below on *Frisbie* v. *Collins*, *supra*, is totally misplaced. *Frisbie* involved interstate abduction. It does not deal with the present question of treaty limitation. To deny this petitioner a hearing on the authority of *Frisbie*, "involves the confusion of two essentially different things which rest upon entirely different principles." *Lascelles* v. *Georgia*, *supra*.

II. Petitioner's challenge to the total jurisdiction of the trial court has neither been waived nor previously litigated.

A. There has been no waiver.

If our contention is sound with respect to the jurisdictional consequences flowing from a treaty violation, then no claim of waiver could serve as a barrier to relief. See McNair, *The Law of Treaties* (1938), p. 334, and Garcia-Mora, *International Law and Asylum as a Human Right* (1956), pp. 132-133. But the district court, resorting to a "jurisprudence of labels," misconceived the nature of the treaty and the theory of territorial sovereignty in which it is rooted by characterizing the consequences of a treaty violation as a matter of "personal jurisdiction," which was waived by failure to raise the issue in timely fashion.

The district court thus ruled that petitioner was not protected by *Rauscher* because that case involved "personal jurisdiction." But *Rauscher* cannot be read as limiting the juridical consequences of a treaty violation to a matter of "personal jurisdiction" waived by failure to raise it prior to trial. *Rauscher* came before the Court on a certificate of division of opinion after verdict of guilty and before judgment, on a motion in arrest of judgment. The defendant stood before the trial court under proper judicial process. No issue of personal jurisdiction presented itself for decision. The question was whether the Government could proceed in conflict with treaty provisions, assuming proper personal process and jurisdiction over the subject matter.

In *Cook*, it was contended that respondent's answer to the merits waived the jurisdictional objection. Distinguishing some of the older cases involving extraterritorial actions in the absence of treaties, Mr. Justice Brandeis rejected this contention (288 U. S. at 122):

> "In those cases it was held that the illegality of the seizures did not affect the venue of the action or the process of the court. Here, the objection is more fundamental. It is to the jurisdiction of the United States. The objection is not * * * lost by the entry of an answer to the merits. The ordinary incidents of possession of the vessel and the cargo yield to the international agreement."

See also *United States* v. *Ferris*, 19 F. 2d 925 (D. C. Cal.).*

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* The district court sought to avoid the impact of *Cook* by commenting that this case is not "even remotely similar to that of the British ship seized in *Cook*" (A. 213), since "jurisdiction over a 'person' was not involved" and "the sole question was the court's power over the specific vessel" (A. 208). If the district court is making a distinction between *things* and *persons* as they relate to the jurisdictional issue, its analysis is purely mechanical and untenable. See Walter Wheeler Cook, *Jurisdiction of Sovereign States*, 31 Columbia L. R. 368, 381 (1931). Moreover, in *Cook* the penalty was assessed against the master of the ship, the vessel and cargo having been libelled in aid of this assessment. See 288 U. S. at 168.

Likewise, the district court's classification of *Johnson* v. *Browne*, 205 U. S. 309, *Cosgrove* v. *Winney*, 174 U. S. 64, *United States* v. *Mulligan*, 74 F. 2d 220 (C. A. 2), and *United States* v. *Ferris*, 19 F. 2d 925 (D. C. Cal.), as "personal jurisdiction" decisions is misleading. In each case, the substance of the treaty issue was placed in terms of taint to the whole proceeding.

If the entire proceeding in each of these cases was so fundamentally tainted, the court could not, of course, exercise its jurisdiction over the person of the defendant. Accordingly, when the various defendants preliminarily raised the treaty objection, the courts did not have to decide whether the objections would have been available at later stages in the proceedings. The fact that relief is granted in the posture of a preliminary objection does not restrict the operative effect of the substance of the objection to that posture. This is sharply illustrated in *Cook* where there had been an answer to the merits. Only then did this Court have to decide whether the treaty objection was such that it contained basic jurisdictional questions which could be raised after waiver of "personal" jurisdiction.

Finally, the district court is wholly in error in saying that "in the case of *Ford* v. *United States*, 273 U. S. 593 (1927)—a case on all fours with *Cook*—petitioners were denied relief because the juris-

The *Cook* case establishes quite clearly that the underlying principle of *Rauscher* is that violation of a treaty results in a total failure of all national and hence judicial power.*

B. The issue was not previously litigated.

While both lower courts attempt to meet the jurisdictional argument directly, they also suggest that the issue is foreclosed in some manner by prior litigation. This suggestion rests upon the fact that after the verdict, but prior to sentence, petitioner made a motion in arrest of judgment challenging the jurisdiction of the court over his person. The Court of Appeals held that this motion raised issues of personal jurisdiction only and since it was not timely made, could not be considered by the court.

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dictional question had not been raised on time" (A. 208). There was no such jurisdictional issue in *Ford*, because there was no extra-territorial action or seizure in violation of the treaty. The seizures in *Ford* were made strictly in accordance with treaty. 273 U. S. at 603, 605. See, also, Harvard Research in International Law, *Apprehension in Violation of International Law*, 29 Am. J. Int. Law, Supplement (1935), at p. 625.

* The commentators agree that the *Rauscher* ruling, as applied in the *Cook* decision, nullifies proceedings in disregard of treaty because of a fundamental jurisdictional defect. And they approve of this principle strongly. Indeed, substantial authority would apply the principle unhesitatingly to violations of general international law, as well as to violations of a specific treaty. Garcia-Mora, *International Law and Asylum as a Human Right* (1956), observes (at p. 135) that removal of fugitives in violation of treaty renders "the proceedings held against such fugitives by the capturing state * * * null and void *ab initio* * * *." See also, Lauterpacht, *Recognition in International Law* (1947), p. 420 and p. 425, and Harvard Research in International Law, *Apprehension in Violation of International Law*, 29 Am. J. Int. Law, Supplement, July, 1935.

Professor Dickinson writes, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 27 Am. J. Int. Law 231, 244 (1933):

> "If the person or thing which is the subject of controversy has been brought within reach of the court process by a breach of

But neither the motion in arrest of judgment nor the appeal from the denial of that motion involved the questions presented in this petition. The charge that the violation of the international treaty of extradition deprived the trial court of total jurisdiction is raised here for the first time. The operative facts upon which the treaty violation depends were not known to petitioner at the time of the original trial or appeal. The newly presented facts are (1) the facts revealing that the United States Government initiated, arranged and participated in the abduction of petitioner from Mexican territory, and (2) the facts revealing that the Government of Mexico neither deported nor expelled petitioner, nor consented in any way to his seizure and removal. These are the facts which ground the charge of treaty violation. These facts were not before

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treaty or international law, the court should approve no arbitrary or face-saving distinctions. The court is an arm of the nation and its jurisdiction can rise no higher, by virtue of process served within the territory, than the jurisdiction of the nation which it represents. If there was no jurisdiction in the nation, to make the original seizure or arrest, there should be no jurisdiction in the court to subject to the nation's law. In terms of American precedents, this means that the underlying principle of *United States* v. *Rauscher* is correct * * * that the principle of the *Mavel Tov* [*Cook* v. *United States*] is unimpeachable. * * *"

Beale, *Jurisdiction of a Sovereign State*, 36 Harvard L. R. 241, 242-243 (1923), agrees that the national power fails when there is conflict with the general principles of international law:

"It cannot be doubted that all countries governed by the common law in fact accepted international law as part of the common law; and that the principles of that law which give or withhold jurisdiction are therefore principles of our common law.

* * *

"It is clear, then, that the sovereign cannot confer legal jurisdiction on his courts or his legislature when he has no such jurisdiction according to the principles of international law."

See also Brief for Petitioners, *Wilson* v. *Girard*, *supra*, p. 10.

the trial court or the original appellate court. They were never raised in this Court at any prior stage of the proceeding.

Thus, to argue that the issue of treaty violation has already been litigated is simply to disregard the allegations of the present petition. This, of course, a court may not do in a Section 2255 proceeding. *Chessman* v. *Teets, supra.* But more than this, the facts now raised revealing a treaty violation, while not known to petitioner, were known to the prosecution and withheld both from the defense and the courts. Indeed, it may be argued that the prosecution had a duty to bring these jurisdictional facts to the attention of the courts. It certainly cannot be argued that petitioner, ignorant of these facts, is precluded from now litigating them because the prosecution knew of their existence.

A reading of the opinion of the original Court of Appeals fully confirms this analysis. Since the motion in arrest of judgment and the affidavit submitted in its support showed no violation of treaty, the only legal issue posed was whether the personal rights of the defendant to be immune from arbitrary seizure were violated in such a manner as to negate the court's jurisdiction over his person.* This question is analogous to problems raised by an arrest without a warrant. See, for example, *United States* v. *Coplon,* 185 F. 2d 629 (C. A. 2). Such a question does not challenge the competency of the court to hear the controversy.

The careful opinion of Judge Frank makes it clear that as far as the original Court of Appeals was concerned the only question raised by the facts then before the court related to the impact of a violation of personal rights upon

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* As Judge Frank pointed out (195 F. 2d at 603, footnote 20), petitioner's contention at that stage rested upon his assertion of "his right to be free from unlawful molestation or assault by his own Government; and his right not to be convicted by an 'admission' wrested from him by a violent act."

jurisdiction over the person. No issue of treaty violation was before the court.* To urge now that petitioner is foreclosed from litigating this issue would disregard logic and governing rules of law.**

III. The importance of the questions presented.

This Court has always construed treaties as binding compacts to be scrupulously observed by this country and its courts.† But the lower courts in this case construed the treaty so as to rob it of its bilateral character and to undermine its very purpose. This petition brings to the Court the fundamental question whether one party to an international compact may unilaterally disregard and violate its obligations at will. The case thus involves not only petitioner's right to a hearing but vital national interests. Indeed, our very standing in the community of nations

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* Perhaps the most striking support for this analysis comes from the Government itself. Petitioner in his original brief on appeal cited *Cook* v. *United States, supra,* in support of his contention that his motion in arrest of judgment was timely. The Government responded (brief to the Court of Appeals, p. 36) that the rationale and holding in *Cook* did not apply to the issues raised in the motion in arrest of judgment because in *Cook* it was a violation of an international treaty which created a defect "relating to jurisdiction over the subject matter, not merely of the person of the master." Hence the Government concluded and so urged upon the original Court of Appeals that the *only* issue presented by the facts raised in the motion in arrest of judgment was one of personal jurisdiction.

** The comment of the district court that "a court is duty bound to raise the question of jurisdiction over the subject matter on its own motion" (A. 207), does not foreclose consideration of the jurisdictional issue raised by the petition. *Kalb* v. *Feuerstein,* 308 U. S. 433; see Boskey and Braucher, *Jurisdiction and Collateral Attack,* 40 Columbia L. R. 1006 (1940).

† Comment, *Treaties and the Supreme Court,* 1 University of Chicago L. R. 602, 617 (1934); Tennant, *The Judicial Process of Treaty Interpretation in the United States Supreme Court,* 30 Michigan L. R. 1016, 1019-1020 (1932).

depends upon our adherence to treaties. Because there is involved in the case the meaning of a treaty, the obligation of the nation as a whole in its dealings with another sovereign, it is peculiarly necessary that review be granted.

All of the questions presented here really frame a single issue: The consequences which flow from the exercise of extraterritorial power in violation of an extradition treaty. This is an issue concerning which this Court rather than the lower courts should speak the final word. And this is particularly so because of the impact of the entire problem upon our foreign relations.

Finally, review is imperative to determine the scope and current applicability of *Ker* in the light of *Cook*.

CONCLUSION

The petition for writ of certiorari should be granted and the order of the lower court should be reversed with directions to grant petitioner a hearing.

Respectfully submitted,

FRANK J. DONNER,
ARTHUR KINOY,
MARSHALL PERLIN,
342 Madison Avenue,
New York, New York.

BENJAMIN DREYFUS,
703 Market Street,
San Francisco, California,

Attorneys for Petitioner.

Of Counsel:
FRANK J. DONNER,
ARTHUR KINOY,
MARSHALL PERLIN,
BENJAMIN DREYFUS,
LUIS SANCHEZ PONTON,
University of Mexico,
Mexico City, Mexico.

APPENDIX I

Excerpts from the Treaty of Extradition of 1899 between the United States and Mexico, and from the Law on Extradition and Constitution of Mexico.

A. The Treaty of Extradition

ARTICLE II

Persons shall be delivered up, according to the provisions of this convention, who shall have been charged with, or convicted of, any of the following crimes or offenses:

1. Murder, comprehending the crimes known as parricide, assassination, poisoning and infanticide.

2. Rape.

3. Bigamy.

4. Arson.

5. Crimes committed at sea:

(a) Piracy, as commonly known and defined by the laws of nations.

(b) Destruction or loss of a vessel, caused intentionally; or conspiracy and attempt to bring about such destruction or loss, when committed by any person or persons on board of said vessel on the high seas.

(c) Mutiny or conspiracy by two or more members of the crew or other persons on board of a vessel on the high seas, for the purpose of rebelling against the authority of the captain or commander of such vessel, or by fraud, or by violence, taking possession of such vessel.

6. Burglary, defined to be the act of breaking and entering into the house of another in the night time, with intent to commit a felony therein.

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7. The act of breaking into and entering public offices, or the offices of banks, banking houses, savings banks, trust companies, or insurance companies, with intent to commit theft therein, and also the thefts resulting from such acts.

8. Robbery, defined to be the felonious and forcible taking from the person of another of goods or money, by violence or by putting the person in fear.

9. Forgery or the utterance of forged papers.

10. The forgery, or falsification of the official acts of the Government or public authority, including courts of justice, or the utterance or fraudulent use of any of the same.

11. The fabrication of counterfeit money, whether coin or paper, counterfeit titles or coupons of public debt, bank notes, or other instruments of public credit; of counterfeit seals, stamps, dies, and marks of State or public administration, and the utterance, circulation, or fraudulent use of any of the abovementioned objects.

12. The introduction of instruments for the fabrication of counterfeit coin or bank notes or other paper current as money.

13. Embezzlement or criminal malversation of public funds committed within the jurisdiction of either party by public officers or depositories.

14. Embezzlement of funds of a bank of deposit or savings bank, or trust company chartered under Federal or State laws.

15. Embezzlement by any person or persons hired or salaried, to the detriment of their employers, when the crime is subject to punishment by the laws of the place where it was committed.

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16. Kidnapping of minors or adults, defined to be the abduction or detention of a person or persons in order to exact money from them or from their families, or for any other unlawful end.

17. Mayhem and any other willful mutilation causing disability or death.

18. The malicious and unlawful destruction or attempted destruction of railways, trains, bridges, vehicles, vessels, and other means of travel or of public edifices and private dwellings, when the act committed shall endanger human life.

19. Obtaining by threats of injury, or by false devices, money, valuables or other personal property, and the purchase of the same with the knowledge that they have been so obtained, when such crimes or offenses are punishable by imprisonment or other corporal punishment by the laws of both countries.

20. Larceny, defined to be the theft of effects, personal property, horses, cattle, or live stock, or money of the value of twenty-five dollars or more, or receiving stolen property, of that value, knowing it to be stolen.

21. Extradition shall also be granted for the attempt to commit any of the crimes and offenses above enumerated, when such attempt is punishable as a felony by the laws of both contracting parties.

[The 1902, 1925 and 1939 supplements to the Treaty added the offenses of bribery, smuggling, and crimes involving narcotics and injurious substances.]

ARTICLE III

Extradition shall not take place in any of the following cases:

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2. When a crime or offense charged shall be of a purely political character.

• • • •

ARTICLE VII

A person who has been surrendered on account of one of the crimes or offenses mentioned in article 2 shall in no case be prosecuted and punished in the country in which his or her extradition has been granted, on account of a political crime or offense committed by him or her previous to his or her extradition, or on account of an act connected with such a political crime or offense, unless he or she has been at liberty to leave the country for one month after having been tried, and, in case of condemnation, for one month after having suffered his or her punishment, or having been pardoned.

• • • •

ARTICLE VIII

Requisitions for the surrender of fugitives from justice, under the present convention, shall be made by the respective diplomatic agents of the contracting parties, or, in the event of the absence of these from the country or from its seat of government, they may be made by superior consular officers.

If a person whose extradition is asked for shall have been convicted of a crime or offense, a copy of the sentence of the court in which he was convicted, authenticated under its seal, with attestation of the official character of the Judge by the proper executive authority, and of the latter by the minister or consul of the respective contracting party, shall accompany the requisition.

When, however, the fugitive shall have been merely charged with a crime or offense, a similarly authenticated

and attested copy of the warrant for his arrest in the country where the crime or offense is charged to have been committed, and of the depositions upon which such warrant may have been issued, must accompany the requisition as aforesaid.

Whenever, in the schedule of crimes and offenses of article 2nd, it is provided that surrender shall depend on the fact of the crime or offense charged being punishable by imprisonment or other corporal punishment according to the laws of both contracting parties, the party making the demand for extradition shall furnish, in addition to the documents above stipulated, an authenticated copy of the law of the demanding country defining the crime or offense, and prescribing a penalty therefor.

The formalities being fulfilled, the proper executive authority of the United States of America, or of the United Mexican States, as the case may be, shall then cause the apprehension of the fugitive, in order that he or she may be brought before the proper judicial authority for examination. If it should then be decided that, according to the law and the evidence, the extradition is due pursuant to the terms of this convention, the fugitive may be given up according to the forms of law prescribed in such cases.

Article XII

A person surrendered under this convention shall not be tried or punished in the country to which his or her extradition has been granted, nor given up to a third power, for a crime or offense not provided for by this convention and committed previous to his or her extradition, unless the consent of the surrendering government be given for such trial or such surrender to a third power.

But such consent shall not be necessary:

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(a) When the accused shall have voluntarily requested to be so tried or surrendered to a third power.

(b) When he or she shall have been free to leave the country during thirty days after discharge from custody because of the charge on which he or she was surrendered, or if convicted thereof during thirty days after having satisfied his or her penalty or having been pardoned.

B. The Law on Extradition of Mexico

In connection with the reception, review, and determination of requests for removal to the United States, of persons charged with the commission of crimes in the United States, the relevant Mexican laws are the Constitution of the United States of Mexico and the Law on Extradition of Mexico (Appendices A and C attached to petitioner's motion of May 8, 1956).

The Law on Extradition of Mexico provides that where treaties exist, "Extradition shall take place in the cases and form as determined by treaties." Chapter I, Article 1. Under Chapter I, Article 3, "The perpetrators of those crimes which are grounds for extradition * * * shall only be extradited in accordance with this law." Chapter II, Article 12, requires that "Extradition shall always proceed through diplomatic channels." Upon request for sequestration of papers; money or other objects in the possession of the accused, "they shall be taken and deposited under inventory by Government agents and shall be turned over to the state that seeks them if extradition be granted, or shall be returned to the detained when set free." Chapter II, Article 15.

Chapter II, Article 16 of the Law on Extradition of Mexico requires (a) proof of the *corpus delicti* and of probable guilt in such a way that "if the crime had been committed on its territory, his apprehension and judgment

could have proceeded in conformity with the laws of the Republic," and (b) production of authenticated texts of the foreign law defining crime and punishment, and a declaration that the law is in effect.

The documents and proof are then referred for judicial hearing to the judge of the district in whose jurisdiction the person is located (Chapter II, Article 17), and apprehension is accomplished through order of the district judge "to the local political authorities of the district, territories or states of the Union" (Article 19).

Upon apprehension, the accused appears before the district judge, is informed of the request, charges and documents, and may present the objections, among others, that the proceeding is contrary to treaty requirements or that it violates *personal guarantees* under the Constitution of the Republic (Article 20). Then, following proof submitted by the district attorney, and after stipulated time limits (Articles 22 and 23), the adjudication is made. If the request is granted, the person is placed in the custody of the Secretariat of Foreign Relations (Article 24).

The final decision as to removal is that of the President of Mexico: "On the basis of the judicial proceedings, the Executive of the Union shall determine whether the extradition shall be agreed to or not, being able to separate himself from the decisions of the Judge, in any case" (Article 25).

Further review of any decision granting removal may be obtained under the writ of *amparo*, pursuant to Article 102, now Article 107, of the Constitution of the United States of Mexico (Articles 27, 28 and 29).

C. The Constitution of Mexico

Among the related provisions of the Constitution of the United States of Mexico are those which declare that

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"Every person in the United Mexican States shall enjoy the guarantees that this Constitution grants, which may neither be restricted nor suspended, except in the cases and under the conditions herein established" (Article 1); "The negotiation of treaties for the extradition of political offenders * * * shall not be authorized; nor shall conventions or treaties be made by virtue of which guarantees and rights established for the individual and the citizen by this Constitution are altered" (Article 15); and no arrest or detention may be carried out without a warrant based on a written charge, and searches must be pursuant to a warrant in writing and are exclusively limited to the terms of the warrant (Article 16).

APPENDIX II

Excerpt from Brief for Defendant in Error, *Ker* v. *Illinois*, pp. 19-21.

Having passed upon the law questions raised by this hearing, the Court may have interest enough in the man and the crime which these questions are put forward to shield, to read another page concerning them. In the month of January, 1883, Frederick M. Ker, having been for many years the confidential clerk for Preston, Kean & Co., bankers of Chicago, asked permission to go to New Orleans for a rest from his labors. When the time for his vacation expired, the bankers instead of *receiving* their clerk, received a letter from him, postmarked at Chicago, in which he generously informed them that there were deficits in his accounts, and the amount of embezzlement would be found to be about $21,000 of the moneys of the bank, and $35,000 of United States bonds belonging to its patrons. The letter contained an intimation that if allowed to take his journey unmolested, the bank would be let alone, but if pursued and brought back, a run would be organized and the bank ruined; and concluded with the cool remark that if successful in future life, he would endeavor to refund the money to those entitled to receive it. Preston, Kean & Co. were not alarmed by the threats, and inaugurated such measures that by the next steamer there went to Aspinwall one of Pinkerton's men, who at Panama found a Chicago overcoat which had been shed and given to a porter. Precaution had been taken to cut the tailor's name from the neck of the coat, but the name of Ker in one of the lapels of the side pocket remained untouched. Learning from the porter that the owner of the overcoat had sailed for Callao, the detective, armed with photograph alone, followed by the next steamer. Arriving there, he went to Lima, and in a few days thereafter, while in a public square, recognized Ker sitting under the shade of a tropical tree, regaling himself with a cigar. An acquaintance followed. Ker could speak French and so could the detective. Becoming interested in each other, a friendship arose. Together they did the city, the theatre and the fandango. Invest-

ments were discussed; Ker had money, the detective had more, and thus dreaming and scheming, days passed into weeks and time wore happily away. In the meantime, at Chicago, the victimized bankers obtained the proper demand from the federal Secretary of State, which came by the next steamer to the friend in Lima. At this time, a state of things existed in Peru which rendered the treaty between the United States and that government inoperative. There was no Peru. The government had a nominal existence at Ariquipa, back in the mountains, eighty-five miles from Lima, but General Lynch, of the Chilian forces, was in military occupation of the capital. Pinkerton's man had no passport to go through the lines to present our demand at the mountain camp of the Peruvian government, but did what was perhaps the next best thing, applied to General Lynch. This officer, doubtless thinking that security to criminals was not part of his mission in Peru, dispatched an officer to aid the detective in putting Ker on his way back to the United States. On board the man-of-war Essex, then in the harbor at Callao on her way to China, he was conducted to a state-room and transported to Honolulu, where it was expected to intercept the departure of a vessel to San Francisco. It happened, however, that this vessel had sailed when the Essex arrived outside the harbor, and Ker enjoyed the sea breezes on board his country's man-of-war for nearly a month, when the next steamer took him aboard for San Francisco. Having been brought to Chicago, Ker, in the course of time, was placed upon his trial. He interposed no denial of the charges and the theft and embezzlement, but relied upon his ability to persuade the United States to take him back to Peru. The court below was not susceptible to these persuasions and gave him ten years' tuition in Joliet to improve his notions of business integrity. With what success his appeal will meet here, remains to be seen.

GEO. HUNT
Attorney General
State of Illinois

APPENDIX III

Expressions of the Department of State in Cases of International Abduction and Violation of Extradition Treaties.

In October, 1872, the British Government protested the forcible seizure without judicial warrant and abduction to the United States, where he was arrested and imprisoned on charges of violating the Ku Klux Act, of Dr. Rufus Bratton, a United States citizen residing in Ontario, Canada. The abduction, the British note said, had been contrived and instigated by an American detective, who was assisted by a Canadian official. As the detective's conduct involved a violation of the territorial independence and sovereignty of Great Britain, it was suggested that Bratton be returned and the proceedings against him dropped. In reply, Secretary of State Fish said that the detective took no active part in the arrest and attempted to exercise no control over Bratton until he had crossed the frontier into the United States, but in other respects confirmed the statements in the British note. Mr. Fish further said:

"When the matter of Bratton's abduction was first brought to the attention of this Government * * *, prompt and immediate steps were at once taken to have him returned to the authorities and jurisdiction of Canada. I trust that I need not assure you that the Government of the United States would lend no sanction to any act of its officers or citizens involving a violation of the territorial independence or sovereignty of her Majesty's dominions."

1 Moore, *Extradition*, Section 190, pp. 283-284.

* * *

The reverse situation is presented by another case between the United States and Britain in 1876 in which the abduction was apparently effected by a British subject with the connivance and aid of American officials. As stated in a communication from Secretary of State Fish to the

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United States Minister at London, one John Blair, who claimed to be an American citizen, a claim which the proofs did not establish, was taken from Kansas on a requisition from the governor of Illinois, obtained on the petition of a person representing himself to be a former member of Parliament and a member of an English law firm, for the surrender of Blair to the authorities of Illinois, to be tried there for perjury. However, possession of Blair's person having been obtained, he was hurried to New York, put on a steamer and taken to England. Mr. Fish asked that the case be investigated and that if the facts were found as stated, "the man be immediately set at liberty and restored to this country, and that the proper steps will be taken both to indemnify him and to punish the parties who have been guilty of an outrage on the personal rights of an individual and on the dignity of both governments." Subsequently, the American Minister reported that Blair had been tried and sentenced in England on a criminal charge. But the British Government caused him to be released, on condition of his return to the United States, and paid his travelling expenses.

Ibid., Section 191, p. 285.

* * *

In another case in 1876, one Peter Martin, a naturalized citizen of the United States, after being tried and convicted of various offenses in Laketon, British Columbia, was taken by his guards through the territory of Alaska on the way to jail in Victoria, B. C. While in Alaska, Martin assaulted one of his guards, for which offense he was tried and found guilty at Victoria. In respect to the assault committed in Alaska, Secretary of State Fish took the position that Martin should be released, because this offense was committed within the jurisdiction of the United States. But, in regard to both offenses and to Martin's detention for any purpose, Mr. Fish said that if Canadian officers in transporting Martin from the place of his con-

viction to the place of his imprisonment conducted him through United States territory, "a violation of the sovereignty of the United States has been committed and the recapture and removal of the prisoner from the jurisdiction of the United States to British soil was an illegal, violent and forcible act which cannot justify the subsequent proceedings whereby he has been, is or may be restrained of his liberty." The hope was therefore expressed that Martin would be released, and on September 25, 1877, the State Department was informed that after an inquiry into the circumstances of the case, the Dominion Government had decided to free him without delay.

Ibid., Section 192, pp. 285-287.

• • •

In 1878, the Mexican Minister informed the Department of State that a Texas sheriff had visited the judicial district of Rio Grande in Mexico for the purpose of securing two persons who had committed murder in Texas. The judge of the district issued a letter requesting Mexican authorities to lend their aid. The men were apprehended by local authority in another locality and delivered to the sheriff who promised to surrender them to the judge of the Rio Grande district. Instead, he took them directly into Texas without any formality. The Mexican Minister asked for the restoration of the prisoners to Mexican jurisdiction and Secretary of State Evarts replied:

"I regret to learn that the provisions of the treaty of extradition with Mexico have been disregarded, as they appear to have been in this instance. The attention of the Governor of Texas will be called to the circumstances of the case, with a view to repairing the injury which seems to have been committed."

Papers relating to the Foreign Relations of the United States, 1878, p. 675.

• • •

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In 1891, the United States demanded the return to American jurisdiction, subject to such regular extradition process as the Spanish government might afterwards institute under the treaty, of one Rufino Rueda, who, on June 19, 1891, after his arrest at Key West, with a view to extradition on a charge of murder in Havana, was during the night taken by Spanish agents on board of a vessel and carried to Havana. The Spanish Government caused the prisoner to be returned to Key West.

4 Moore, *Digest of International Law* 330. See, also, Herbert W. Bowen, *Recollections Diplomatic and Undiplomatic* (New York, 1926), pp. 164-166.

* * *

In the case of the abduction from New York to Switzerland of the child Constance Madeleine His, an American citizen, by her Swiss father, Secretary of State Blaine instructed the American Minister at Berne on March 1, 1892:

"It is common practice between nations where a fugitive from justice has sought asylum in another country and has been kidnapped, whether by officers or private individuals, or has been procured in some other irregular way, and carried back to the country from which he fled, to return such a fugitive on the request of the Government whose sovereignty has been violated. If the worst criminal had fled Switzerland to this country and had been taken out of our jurisdiction and back to Switzerland in the manner in which this child has been taken, this Government can not doubt that the Swiss Government would, upon request, promptly return such a person to our jurisdiction."

On July 27, 1892, Secretary of State Foster wrote to the American Minister in relation to the same case:

"I regret that the Swiss Government does not regard those circumstances such as to require the child's return.

to the United States. Its position seems to be that however wrongfully the child was taken from this country and brought into Switzerland, since she is now there and the subject of proceedings pending in its courts, the executive authority will not interfere, but the custody of the child must abide their result. None of the proceedings referred to were begun until after the wrongful abduction of the child, which it is clearly their sole purpose to sustain. The position taken by the Federal Council permits Mr. His, in contravention of a fundamental principle of equity, to take advantage of his own wrong. Generally, too, it would permit any person to enter the territory of a friendly government and abduct or kidnap its citizens and carry them into its own country, where they must abide the result of whatever proceedings may be instituted against them or with respect to them."

The despatch continued to recite the recent action of the British Government in voluntarily returning a youth, a citizen of Canada, who had been kidnapped or enticed from the United States and tried and convicted of an offense in Canada committed there prior to his flight to the United States.

Papers relating to the Foreign Relations of the United States, 1894, pp. 648-650.

* * *

In answer to a note from the Mexican Department of Foreign Affairs pointing out a contravention of Article X of the extradition treaty in that the governor of Texas, outside of diplomatic channels, made a direct request on the governor of Tamaulipas for the provisional detention of a man charged with murder in Texas, which request was granted by the governor of Tamaulipas, Secretary of State Root wrote on November 2, 1905:

"The view of the Mexican foreign office that, in order to secure the provisional arrest and detention in Mexico of a fugitive criminal, it is necessary, under the provisions of Article X of the extradition treaty, to make request therefor through the diplomatic channel is correct."

Explaining the possible consequences of such a violation of the treaty, the Mexican Secretary of Foreign Affairs, Don Ignacio Mariscal, wrote to the American Chargé d'Affaires on November 28, 1905:

"* * * should it ever occur that at the time of proceeding in the irregular manner observed heretofore by the frontier authorities of both countries the recourse of amparo be interposed against an illegal act, such as the provisional detention in which the provisions of the extradition treaty have not been followed, the amparo would have to be granted, and this might cause legal difficulties against the subsequent course of the proceedings."

Ibid., 1905, pp. 662-663.

A memorandum from the British Embassy on May 24, 1906, raised the imprisonment of one Arthur McIntire for a non-extraditable offense after his surrender by Great Britain. McIntire had jumped bail and fled to England after being convicted of using the United States mails to defraud. Since this offense was not extraditable, his bondsmen charged him with embezzlement, and his extradition was applied for and granted. Upon his return, he was imprisoned on the original conviction, the charge of embezzlement being dropped or dismissed.

In a reply memorandum, the State Department wrote on June 4, 1906:

"In respect to the charge of mala fides in procuring the extradition, the department hardly needs to assure the embassy of its emphatic condemnation of any and all such

subterfuges as it is alleged were practiced by the bondsmen in this case. Close scrutiny is given by the department to all applications for extradition before their presentation to a foreign government, in order to detect, wherever possible, any abuse of extradition process; but, if such abuse occurs, the remedy in a proper case would appear to be a judicial and not an executive function."

In further explanation of this affair, Acting Secretary of State Adee forwarded on September 24, 1906, to the British Ambassador a communication from the Acting Attorney-General which said that in imprisoning McIntire on a charge different from that for which he was extradited "no advantage was taken of McIntire. He was cautioned by the United States attorney that the offense of which he had been convicted in the United States court was not extraditable and that, so far as the United States was concerned, he was at liberty to return to London if he so desired."

Ibid., 1906, pp. 785, 791.

* * *

In an instruction to the American consulate at Cairo, on September 24, 1909, regarding a request for the provisional arrest and detention of a fugitive in Egypt, the State Department said that it "considers it improper and not in accordance with present municipal law for American consular officers in extra-territorial countries to follow the practice of consuls of other countries by themselves apprehending and returning, by virtue of their extraterritorial powers and jurisdiction, criminals who are fugitives from justice in this country."

Ibid., 1909, p. 596.

* * *

Acting on a report from the American consul at Nuevo Laredo that Samuel Cantú, former mayor of Lampasos,

Appendix III

Mexico, was on January 26, 1914, enticed to the middle of the international bridge, seized on the American side of the boundary by two Mexican officers, dragged across the boundary and thrown into prison, Secretary of State Bryan on January 27, 1914, instructed the consul and the American Chargé, O'Shaughnessy, at Mexico City, to demand the immediate release of Cantú and his return to the American side of the border. On January 29, Mr. Bryan instructed Mr. O'Shaughnessy and the consul to renew the demand for Cantú's release and to "intimate that unless this demand is immediately complied with, this Government will find it necessary to consider drastic measures in the premises." Cantú was released on February 1, 1914, and brought to Laredo by the American consul.

Ibid., 1914, pp. 900-903.

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IN THE

Supreme Court of the United States

October Term, 1957

Nos. 440 and 441

MORTON SOBELL,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

FRANK J. DONNER,
ARTHUR KINOY,
MARSHALL PERLIN,
342 Madison Avenue,
New York, New York.
BENJAMIN DREYFUS,
703 Market Street,
San Francisco, California,
Attorneys for Petitioner.

Of Counsel:
FRANK J. DONNER,
ARTHUR KINOY,
MARSHALL PERLIN,
BENJAMIN DREYFUS,
LUIS SANCHEZ PONTON,
University of Mexico,
Mexico City, Mexico.

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IN THE

Supreme Court of the United States

October Term, 1957

Nos. 440 and 441

MORTON SOBELL,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

The petitioner, Morton Sobell, prays for a rehearing and reversal of the order of this Court entered November 12, 1957, denying his petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit.

This petition for rehearing is made pursuant to the provisions of Rule 58 of the Rules of this Court upon substantial grounds available to the petitioner although not previously presented.

Reasons Why a Rehearing Should Be Granted and Writs of Certiorari Issued

I.

There are some cases which, though formally dealing with the rights of a single individual, inescapably pose deeper questions relating to the ability of our society to exercise properly the powers of a state. No one case that we know of raises such questions as seriously as this one.

This Court hardly need be reminded that this case is a tragedy of the cold war. Few thinking men or women will challenge the assertion that its course was affected adversely by fear, by passion and by extrinsic political considerations. A long chain of events, from the prosecution's seizure of petitioner in Mexico without the consent, participation or knowledge of that government, to the last days preceding the execution of his co-defendants,* to the incarceration of petitioner in Alcatraz Penitentiary, proclaims this fact.

But with apparent unanimity, this Court still refuses to exercise its certiorari jurisdiction and examine the serious questions bearing upon the validity and integrity of this trial. Unfortunately the recent comment of Professor Bernard Schwartz, *The Supreme Court*, remains valid:

> "Perhaps we are being overcritical of the Court's action in the *Rosenberg* affair. The case itself and the judicial disposition of it are but symptoms of the period of tension through which we have been passing. To talk of the commonwealth as endowed with life is more than a mere metaphor. The political, like the animal, body has its periods of sickness and vigor. The past decade and a half has, without any doubt, been one in which our body politic has been constantly afflicted. At such a time, it is to be expected that much of the vital spark goes out of the society, as it would out of an afflicted individual. This understood, let it not seem idle if we refer once again to the fact that our old

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* See 54, *Columbia Law Review*, 219 at page 260:

"The inevitable conclusion is that in this last stage of an extraordinarily protracted litigation, the rights of the Rosenbergs did not receive the precise and extensive consideration that must characterize the administration of the criminal law. Whether the Rosenbergs were in fact guilty is beside the point. In the vindication of their rights, they were entitled to the equality of treatment afforded by the technical safeguards of the law."

> Physician's Aphorism holds in politics and law, as it does in animal life. In a period of cold war, the law knows of its health, as it could never be expected to in less troubled times. It should, however, be recognized that, in the animal body, health is the natural, sickness the artificial, state. The cold-war jurisprudence of the highest Court may thus be characterized as an artificial jurisprudence. In all vital things, men distinguish between artificial and natural, with the artificial being considered as something inferior. Few students of the Supreme Court will deny that this is true as well of the recent 'artificial' jurisprudence of the high tribunal. To be sure, the day will come when the body politic, like the animal body, will be restored to its pristine state of full vigor. We cannot, of course, know just when that will happen, just as no one at the bottom of an economic cycle can be sure just when prosperity will come around the corner. Yet happen it will, in our legal as in our political life. Then it will be that cases like some of those discussed in this chapter will be looked upon as the aberrations in the law that they really are." (At p. 341)

* * *

Subsequent to the submission of these petitions, the Government, through the extraordinary medium of a national magazine, announced that it recognized that world-wide doubts remain concerning the fairness of petitioner's conviction. By means of a government-sanctioned article in *Look Magazine* of October 29th, it advised the public that it had prepared a report for publication to be used in an attempt to put these questions to rest.

We urge the Court to reconsider these petitions in light of the Government's concession, novel as the form may be, that the public interest requires a further airing of the questions beclouding this case. It is more appropriate to invoke the certiorari jurisdiction of this Court than the channels of the press to resolve such issues.

Justice is not served by a refusal to review these charges underlying the present petitions. How is this nation strengthened by the denial of a hearing to a scientist imprisoned in the harshest of our penal institutions? What societal value is served by a curt refusal to grant this man the day in court any prisoner would have received on the basis of similar allegations? Must petitioner's showing in his moving papers exceed that demanded in the case of any common criminal? See *Chessman* v. *Teets*,— U. S. —, 77 S. Ct. 1127.

For surely, these petitions were not devoid of legal merit. And can it be said that the petitions were denied for failure to raise issues of weight and substance worthy of the certiorari jurisdiction of this Court? For, what is weightier than the conscience of a nation and its sense of right-doing and fair play?

So long as this case remains unreviewed by this Court, so long as a veil of judicial obscurity lies across it, so long as petitioner is denied an opportunity to prove his charges, no final judgment can be made upon the verdict rendered in this case. This Court has failed on at least eight occasions to consider this case, to determine whether this trial was in accord with basic concepts of due process. This has not served to enhance the prestige of our system of law.

As in all chapters of man's inhumanity to man, no one can hide injustice forever. Petitioner persists in his claim of innocence. We are convinced that he will be freed, that he will not be forced to suffer the full penalty of a thirty-year sentence. But is it necessary that he should lie incarcerated until the slow processes of history expose to the light of day his claims of injustice? Is it not the very purpose and heart of the writ to avoid such an unfortunate result?

The records of this Court are replete with evidence that it has expressed a high degree of concern and sensitivity to the administration and scope of habeas corpus proceed-

ings in both the federal and state courts. *Sunal* v. *Lodge*, 332 U. S. 174; *Van Moltke* v. *Gillies*, 332 U. S. 708; *Price* v. *Johnston*, 334 U. S. 266; *Commonwealth of Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116; *Chessman* v. *Teets*, — U. S. —, 77 S. Ct. 1127.

This Court has afforded review in habeas corpus proceedings where grounds normally required in granting certiorari have not been present. In *Alcorta* v. *Texas*, October Term, 1957, No. 139, decided November 12, 1957, the Court was faced with no novel question of habeas corpus law. It has long been established that such conduct by the prosecution constitutes a denial of due process and invalidates a conviction. But due regard for justice and the prestige of our courts impel a reviewing court to act in such circumstances. The very possibility that a prosecutor will misuse his office to contrive a fraudulent conviction is so abhorrent to our system of law that this Court has been alert to examine cases which, on their face, suggest the possibility of such a wrong. Thus, the refusal of this Court to grant petitioner's applications for writs of certiorari is a departure from the Court's recognition of its particular role in intervening where prejudice threatens a miscarriage of justice.

We do not mean to suggest that this Court should improvidently grant petitioner's applications for writs of certiorari if there were no conceivable merit in his contentions or no conceivable substance in the questions he has raised in the two petitions. Nor do we suggest that certiorari should be granted merely because of the conviction by many that this case is an aberration in the law. But we do believe that these considerations warrant the Court's attention before determining its final position in the present proceedings. These considerations are "special and immediate reasons", which, superimposed upon the grounds heretofore tendered, make necessary the exercise of certiorari jurisdiction. It is time for this Court to review this case.

II.

On the very day this Court denied relief to petitioner, it rendered its decision in *Alcorta* v. *Texas, supra,* reversing the judgment of conviction. Petitioner, unlike Alcorta, was never granted a hearing on his charges and, hence, the burden carried by him in seeking review by this Court is more limited than that imposed upon Alcorta.

A comparison of the record of the two cases does not reveal any significant legal differences. In both instances, the prosecution's misconduct was of the same nature—the merger of perjured and misleading testimony accompanied by the suppression of evidence which would have altered and recast the significance and meaning of that testimony in the minds of the jurors. In both cases, the testimony referred to issues unrelated to the actual commission of the alleged offense, and in both instances, the rationale of the prosecutor was the same—that the suppressed evidence was not legally significant.*

Was not Huggins' testimony, like Castilleja's, in *Alcorta,* false and misleading when he characterized petitioner as a deportee and when he attested to the correctness of the entry "Deported from Mexico" on Government Exhibits 25 and 25A, and when he said the petitioner was brought to Laredo by persons acting in their "official capacity"? (R. 1026). Was not the prosecution fully aware of the impression made upon the jury that this was the "other evidence of deportation" promised by Mr. Cohn? (R. 926). The prosecution and Huggins knew that the testimony would have had a completely different impact if the jury had been advised that agents of the FBI abducted petitioner; that the Mexican Government protested rather than participated in or condoned this act. Would not the fully

* This rationale was adopted by the District Court in denying petitioner's motion (A. 220).

disclosed truth have eliminated the prejudicial impression that the Mexican Government considered it necessary to remove petitioner as an undesirable alien and over his objection?

The suppressed facts in *Alcorta* were more susceptible to discovery than those hidden from petitioner by the prosecution. Here the suppressed evidence was particularly difficult to unear a, relating as it did to purported international transactions and understandings. The prosecution framed its questions in interrogating Huggins so as to prevent disclosure that (1) its own agents illegally seized and abducted appellant; (2) the Mexican Government in no way participated in or authorized this act; and (3) representatives of the Mexican Government on at least two occasions advised the prosecution that Mexico did not sanction these illegal actions (A. 25-29). And it was just this evidence, unknown to petitioner, which was necessary to the prosecution's fraud (A. 20, 74).

Nor could petitioner have been expected to obtain the full story of his removal from Mexico to rebut Huggins' testimony and Government Exhibit 25A.* Not only was he incarcerated continuously from the time of his arrival in Laredo; not only did he lack the facilities and funds to institute such an investigation, but he could not foresee

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* The district court attempted to respond to petitioner's contention by referring to his subpoena *duces tecum* served upon the Mexican Consulate in New York directing it to produce his application for a tourist card as proof of his lawful entry into that country. The Mexican Consulate refused to submit to the jurisdiction of the court, but indicated that upon request, it would consider producing petitioner's tourist card application. But petitioner did not ask for, and the Mexican Consulate in New York obviously was in no position to know, let alone provide information relating to the circumstances of his removal. Moreover, petitioner presumed that the Mexican Government had sanctioned his ouster. He deemed it highly unlikely that the prosecution had not obtained Mexico's consent when it represented that Mexico had deported him.

that the prosecution would use the circumstances of his removal as proof of flight or that it would contend that he had been legally deported. Indeed, until full inquiry was made, he had no reason to believe that his removal was without the consent of the Mexican Government, nor was he in a position to prove such charges.

We have set forth in detail some of these matters to demonstrate that the very factors which underly this Court's action in *Alcorta* require similar relief to petitioner. But further, it serves to substantiate the contention that petitioner is not being afforded equal justice under the law. The denial of the minimal relief requested by this petitioner, that he be afforded an opportunity to demonstrate to this Court that he is entitled to a hearing to prove his charges, should not be met with judicial silence any more than should the substantial issues of fact have been resolved *ex parte* by the lower courts.

III.

Under the decisions of this Court, see *Price* v. *Johnston* and *Chessman* v. *Teets*, both *supra*, petitioner may make a second application for relief under Section 2255 on the basis of additional facts or reframed pleadings which would meet any purported deficiency in his present motions. It is common practice in the federal appellate courts to advise one of the basis of the Court's actions and, where possible, remand a Section 2255 proceeding to the district court with leave for the applicant to recast his pleadings, correct procedural defects or incorporate additional facts. Frequently the denial of relief on the appellate level is accompanied by a notation which aids the prisoner in properly framing a second application.

This sensible approach reflects the court's regard for doing justice and its aversion to stand upon technicalities as a basis for denying a prisoner relief. For "men incarcerated in flagrant violation of their constitutional

rights [must] have a remedy." *Commonwealth of Pennsylvania ex rel* v. *Claudy, supra*, at 123. It is the duty of the courts not merely to grant or deny relief but to set forth the guideposts to permit a prisoner to determine whether he is entitled to relief. Unfortunately, the complete silence of this Court in this instance in light of the peculiar antecedent events in the current litigation, deprives petitioner of an intelligent basis for determining the propriety and nature of a second application.

Concededly, a denial of a petition for writ of certiorari usually does not note the basis of this Court's action. Nor does the denial of such relief constitute approval of the action of the lower courts. Yet here, such silence prejudicially affects petitioner's ability to make use of the rights afforded him under *Price* v. *Johnson* and *Chessman* v. *Teets*.

The opinion of the district court in reality was not a response to petitioner's pleadings. Judge Kaufman, in his passionate defense of the validity and fairness of the original trial, misstated petitioner's charge to be that Huggins' testimony was false in that the Mexican authorities failed to comply with their own regular deportation proceedings in effecting his removal from that country. [A. 217-218] But the opinion completely ignored plaintiff's actual contention that the prosecution's fraud is founded upon the fact that he was kidnapped solely by agents of the prosecution with no involvement on the part of the Mexican authorities, and that this seizure was falsely characterized as an act of México. From this false premise, the district court erected its structure and disposed of the application by concluding that even if all the facts set forth in the motion were true, there was no ground for relief.

The district court concluded that the record demonstrated that the challenged evidence was tendered to prove the Mexican authorities had expelled or ejected petitioner

and that there was no intent or attempt on the part of the prosecution to prove he had been legally deported.

On the other hand, the Court of Appeals premised its affirmance upon the very opposite grounds. After evaluating the record as if a hearing had been granted, it found, *ex parte*, that petitioner had been deported by the Mexican Government. Perhaps it felt constrained to do so, otherwise it would have contradicted the decision of the Court of Appeals on the original appeal, when the original panel concluded that the challenged evidence established that petitioner had been legally deported by the Government of Mexico.*

Had the lower court done otherwise and acknowledged that petitioner was not deported, it would be constrained to find that on the original appeal the prosecution induced this error by representing that Mexico had deported petitioner. The Government completely ignored this problem in its opposition to the petition for writ of certiorari. The silence of this Court does not resolve the question.

Hence, this Court's denial of the petitions for writ of certiorari, without comment, accentuates the confusion created by the decisions of the two lower courts. Petitioner can only conjecture what in fact was the basis of this Court's action, as well as that of the lower courts.

Was there an insufficient factual showing of the falsity of the evidence or the prosecution's guilty knowledge? This hardly seems to be the basis when the government and the

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* As the Court then stated in *United States* v. *Rosenberg*, 195 F. 2 (d) 583:

"* * * The Government introduced evidence to show that Sobell had been legally deported from Mexico * * *" (at p. 603). "It seems particularly inconsistent, therefore, for Sobell not to have introduced evidence, during the trial, of his kidnapping to contradict the Government's evidence of legal deportation" (p. 603, footnote 20).

lower court have never suggested as much. Hearings have been granted on much less substantial pleadings. Was it that the fraud did not relate to the ultimate issue of guilt and innocence? We cannot conceive of this Court condoning such an approach.

Was it that petitioner knew or should have known all the facts that he alleges were suppressed and unknown to him? But that would be legally irrelevant and further, petitioner's awareness is itself an issue of fact, which could only be disposed of in the course of the hearing. Did the participation of local policemen, solely at the behest of the prosecution and unauthorized by any Mexican agency, convert the abduction into an act of the Mexican Government or a deportation by their authorities? We know of no law to support such a proposition.

Was it that petitioner touched upon some aspects of the issues in his motion in arrest of judgment? The decisions of this Court in *Price* v. *Johnson* and *Chessman* v. *Teets*, both *supra*, dispose of that argument which, if sanctioned would destroy the meaning and value of the writ. As Mr. Justice Douglas stated in his dissent in *Chessman*:

> "I for one would hate to see it [habeas corpus] abolished or greatly curtailed by Congress. It has done high service in the administration of justice. • • • Perhaps, as in Massey v. Moore, 348 U. S. 105, the issue could not be raised at the trial. Perhaps the trial lawyer failed to present it clearly. Perhaps only after the trial were the full facts known. Perhaps the issue was poorly focused in the trial court's charge. On habeas corpus the facts can be fully developed; and perhaps only then can the basic constitutional defect be laid bare."

Confusion is compounded further when the lower court denies without comment a motion to incorporate newly acquired evidence relating to the very issue upon which it disposed of the appeal. This document substantiated petitioner's allegations that he was not expelled, let alone

deported, by the Mexican Government. This Court's silence in not directing that the proceeding be remanded with leave to petitioner to amend his motion and incorporate the new document only makes more enigmatic the basis of its action.

If petitioner were to return to the district court and make a second application incorporating the newly acquired evidence, or by otherwise amending his application, neither petitioner nor the lower court would be afforded any basis for determining whether or not the matter was considered by this Court and whether or not the amended petition should be judged *de novo*. A prisoner burdened with a thirty-year sentence should not be caused to bear this judicially-caused confusion.

CONCLUSION

The petition for rehearing should be granted, this Court's order of November 12, 1957 vacated and writs of certiorari issued to the United States Court of Appeals for the Second Circuit.

In the alternative, the Court should remand the proceedings to the district court with directions that petitioner be granted leave to amend the motions by incorporating therein the newly acquired evidence.

Respectfully submitted,

FRANK J. DONNER,
ARTHUR KINOY,
MARSHALL PERLIN,
342 Madison Avenue,
New York, New York.
BENJAMIN DREYFUS,
703 Market Street,
San Francisco, California,
Attorneys for Petitioner.

Of Counsel:
FRANK J. DONNER,
ARTHUR KINOY,
MARSHALL PERLIN,
BENJAMIN DREYFUS,
LUIS SANCHEZ PONTÓN,
University of Mexico,
Mexico City, Mexico.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

MARSHALL PERLIN.